(22,125.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 519.

HIPOLITE EGG COMPANY, CLAIMANT OF FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGGS, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE UNITED STATES.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 8, 1910.

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1 *Placita.*

Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held in the City of Peoria, in said Division and District, before the Honorable J. Otis Humphrey, Judge of said Court, on Monday, the twentieth day of December, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States of America the one hundred thirty-fourth.

2 UNITED STATES OF AMERICA
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Be it remembered, that heretofore towit, on the 11th day of March, in the year of our Lord one thousand nine hundred and nine, that being one of the days of the April Term A. D. 1909, of the District Court of the United States for the Northern Division of the Southern District of Illinois, there was filed in the office of the Clerk of said Court a certain Libel, which said Libel was and is in the words and figures as follows, to-wit:

3 *Libel.*

Filed M'ch 11, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

To the Honorable J. Otis Humphrey, Judge of the United States District Court for the Southern District of Illinois:

The Libel of the United States of America by William A. Northcott, United States Attorney, in and for the Southern District aforesaid, who in this case prosecutes in its behalf, respectfully represents as follows:

1.

This libel is filed by the United States of America in its own right and prays seizure for condemnation of certain articles of food contained in fifty cans, more or less, purported and represented to be "Preserved Whole Egg" as hereinafter particularly set forth in accordance with the Act of Congress in such case made and provided, approved June 30, 1906, and more commonly known as Food and Drugs Act.

2.

Your libelant represents to the Court that in the City of Peoria, County of Peoria, State of Illinois, in said Division and District and within the jurisdiction of this Court, and within the premises
4 of Thomas and Clarke, a corporation duly organized and existing under the laws of the State of Illinois, and having a place of business in the City of Peoria, and engaged in the business of conducting a so-called "Crackers Bakery" in said City, are certain articles of food being owned or in the possession of the said Thomas and Clarke, being of the more particular description following: Fifty cans, more or less, each containing forty-two lbs. labeled as follows, to wit, "Preserved Whole Egg, prepared by the Hipolite Egg Company of St. Louis, Mo., for Thomas and Clarke, Peoria, guaranteed serial No. 20595," each of said cans then and there containing an article of food known as "Preserved Whole Egg" and intended to be used in the manufacture of crackers, cakes and other articles of food for the consumption of human beings.

3.

Your libelant further represents that the said fifty cans, more or less, of food, more particularly described above, are illegally held as aforesaid within the jurisdiction of this Honorable Court, and that the said articles are adulterated in violation of the Act of Congress of June 30, 1906, and liable to condemnation and confiscable as provided therein for the reason that the said fifty cans, more or less, then and there contain an article of food prepared from eggs and which said article of food then and there contains an added deleterious ingredient which then and there renders said article injurious to health, to wit, said article of food then and there contains added to it a deleterious ingredient known as Boric acid.

4.

Your libellant further represents that all the matters above set forth are true as he verily believes from the information coming to him in his official capacity from the Honorable James Wil-
5 son, Secretary of Agriculture of the United States;

That the said fifty cans, more or less, containing said food product and so adulterated as above set forth, have been transported from the City of St. Louis, in the State of Missouri, to the City of Peoria in the State of Illinois, in the Division and District aforesaid, and remain unsold in this District in the original and unbroken package, in the possession of Thomas and Clarke in the City of Peoria, in violation of the said Act approved June 30, 1906.

Wherefore, in consideration of the premises, your libelant prays: That the said articles of food consisting of the said fifty cans, more or less, adulterated as aforesaid, may be proceeded against and seized for condemnation in accordance with the Act of Congress, approved June 30, 1906, and to this end this Honorable Court may order to issue the process of attachment in due form of law according to the course of this Honorable Court in cases of admiralty

and maritime jurisdiction, so far as is applicable in this case, and that the said Thomas and Clarke, a corporation, and all other persons having or pretending to have, any right, title or claim in and to the said articles of food above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid.

That by an appropriate order this Honorable Court may adjudge and decree that the said articles of food contained in the said fifty cans, more or less, may be condemned at the suit of this libelant, according to the provisions of the Act of Congress of June 30, 1906.

That this Honorable Court may pass all such orders and decrees and judgments as may be necessary in the premises and may
6 grant your libelant a decree for the costs of this proceeding against the said Thomas and Clarke, a corporation, or the owners or holders of the said articles condemned, should such costs not be satisfied out of the proceeds of the same.

And that your libelant may have such other and further relief as the nature of the case may require.

W. A. NORTHCOTT,
Attorney for the United States in and for the Southern District of Illinois.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, W. A. Northcott, on oath state that I am the Attorney of the United States in and for the Southern District of Illinois, that I have read the foregoing libel by me subscribed, and that I know the contents thereof; that the matters and facts therein stated on my personal knowledge are true, and that those stated on information and belief, I believe to be true.

W. A. NORTHCOTT.

Subscribed and sworn to before me this tenth day of March A. D., 1909.

[L. S.] R. C. BROWN, *Clerk.*

Endorsed: # 211. In the Dist. Court, No. Div. So. Dist. of Ill. United States of America vs. Fifty cans more or less of preserved whole egg. Libel. Filed Mar. 11, 1909, R. C. Brown, Clerk. W. A. Northcott, U. S. Att'y.

And thereupon there issued from said Clerk's office a certain Monition, which said Monition, together with the Marshal's Return to same, is as follows; towit;

7 *Motion.*

Issued M'ch 11, 1909. Filed M'ch 13, 1909.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

The United States of America to the Marshal of the Southern District of Illinois, Greeting:

Whereas, a libel has been filed in the District Court of the United States, in and for the Southern District of Illinois, on the 11th day of March in the year of our Lord one thousand nine hundred and nine by The United States of America against fifty cans more or less of preserved whole egg on the premises of Thomas and Clarke for reasons and causes in said libel mentioned, and praying the usual process and motion of said Court in that behalf to be made, and that all persons having or pretending to have any right, title or interest therein, may be cited to appear, and answer, all and singular, the matters in said libel articulately propounded, and that this Court would be pleased to pronounce as to the liability of said fifty cans more or less to seizure, confiscation and condemnation under the provisions of the act of June 30-1906.

You are therefore commanded to attach the said Fifty cans more or less of preserved whole egg, and to detain the same in your custody until the further order of this Court respecting the same; and to give notice, by publication in the Peoria Herald-Transcrip for fourteen days previous to the day of trial, and by notice posted up in the most public manner, for the space of fourteen days, at or near the place or trial of such seizure and libel, to all persons claiming the said Fifty cans more or less of preserved whole egg or knowing or having anything to say why this Court should not pro-
8 nounce against the same, according to the prayer of the said libel, and that they be and appear before the said Court, to be held in and for the Southern District of Illinois, at the United States Court Room, in the City of Peoria, in said District, on the first Monday in April next, if that be a day of jurisdiction; if not, then on the first day of jurisdiction thereafter, at 10 o'clock in the forenoon of that day, then and there to interpose a claim for the same, and to make their allegations in that behalf.

And what you shall have done in the premises do you then and there make return, together with this writ.

Witness, the Honorable J. Otis Humphrey, Judge of said Court, this 11th day of March in the year of our Lord one thousand nine hundred and nine and of our independence the 133rd year.

[SEAL.] R. C. BROWN, *Clerk.*

9 *Marshal's Return.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I have served this writ within my district in the following manner, to-wit:

In pursuance with instructions contained in the within Monition I have this day seized Fifty-Two (52) cans of preserved whole eggs found on the premises of Messrs. Thomas and Clarke, Mfgs. of Crackers & Cakes, located at No. 310 South Washington Street in the city of Peoria, Illinois, and have the said Fifty-Two cans of preserved whole eggs in my custody as within I am commanded, this 11th day of March A. D. 1909. I also personally delivered a true copy of this writ to A. V. Thomas, member of said firm.

L. A. TOWNSEND,
U. S. Marshal,
By S. O. TRIPP, *Deputy.*

Marshal's fees:

1 mile to serve	.06
1 Service	2.00
Hauling eggs	1.50
Proclamation	28.00
	$31.56

I further return that I have caused to be published in The Peoria Herald-Transcript Company, which is a public secular newspaper, printed and published daily in the city of Peoria, in the said County and State of Illinois, fifteen (15) different times, and fifteen (15) successive days from the 12th day of March A. D. 1909, to the 26th day of March A. D. 1909, inclusive, as per the certificate of the publisher of said Herald-Transcript Company, hereto attached, a monition in this case.

L. A. TOWNSEND,
U. S. Marshal,
By S. O. TRIPP, *Deputy.*

Endorsed: Peoria's No. 1554-1575-No. 211. District Court, United States, Southern District of Illinois, Northern Division. In Admiralty. United States of America vs. Fifty cans, more or less of Preserved whole eggs. Monition Returnable first Monday in April A. D. 1909, R. C. Brown, Clerk. Filed M'ch 13th, A. D. 1909, R. C. Brown, Clerk. W. A. Northcott-Proctor for Lib'nt.

10 *Certificate of Publication.*

STATE OF ILLINOIS,
County of Peoria, ss:

The Herald-Transcript Company (which is incorporated and doing business under and by virtue of the laws of Illinois) hereby certifies that it is the Printer and Publisher of The Peoria Herald-Transcript, which is a public secular newspaper, printed and published daily in the City of Peoria, in the said County and State aforesaid, and of general circulation in said County. Said Company further certifies that the accompanying notice entitled Monition, dated the — day of —— A. D. 190—, and signed by L. A. Townsend has been published 15 different times, and 15 successive days in the said The Peoria Herald-Transcript; that is to say, in each and every copy thereof, printed and published on the following respective days, to-wit:

First. The 12th day of March A. D. 1909
to The 26th day of " A. D. 1909
inclusive.

In testimony whereof, The said Company has caused this Certificate to be executed by its Secretary and attested with its Corporate Seal in accordance with the provisions of its By-Laws, at Peoria, this 27th day of March A. D. 1909.

[CORPORATE SEAL.]

HERALD-TRANSCRIPT COMPANY,
By CHAS. H. MAY,
Secretary of said Corporation.

B.

Fee for Publication $28.00
—— Papers .....
Total $28.00

Received Payment,

—— ——.

11 *Marshal's "Monition" Attached to Monition.*

Monition.

In the United States District Court for the Southern District of Illinois, Northern Division.

No. 211. In Admiralty.

UNITED STATES OF AMERICA
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGGS.

In obedience to a Warrant of Seizure to me directed, in the above-entitled cause, I have seized and taken into my possession the following-described property to wit: Fifty-Two Cans of Preserved Whole Eggs. For the causes set forth in the libel now pending in the U. S. District Court for the Southern District of Illinois, at Peoria, Illinois.

I hereby give notice to all persons claiming the said described Fifty-Two Cans of Preserved Whole Eggs, or knowing or having anything to say why the same should not be condemned and forfeited, and the proceeds thereof distributed according to the prayer of the libel, that they be and appear before the said Court, to be held in and for the Southern District of Illinois, at the United States Court Room, in the City of Peoria on the Fifth day of April, 1909, at 10 o'clock on the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

L. A. TOWNSEND,
U. S. Marshal, Southern Dist. of Illinois,
By S. O. TRIPP, *Deputy.*

March 11, 1909.

12 And afterwards, to-wit; on the 10th day of August, A. D. 1909, *the* was filed in the office of the Clerk of said Court, the amendment to the libel herein and said amendment is as follows:

Amendment to Libel.

Filed Aug. 10, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Now comes W. A. Northcott, United States Attorney, attorney for libelant, and leave of Court having first been duly granted filed this his amendment to the third section of the Libel heretofore filed in the above entitled cause so as to make said third section read as follows:

3.

Your libelant further represents that the said Fifty cans, more or less, of food, more particularly described above, are illegally held as aforesaid within the jurisdiction of this Honorable Court, and that the said articles are adulterated in violation of the Act of Congress of June 30, 1906, and liable to condemnation and confiscable as provided therein for the reason that the said Fifty cans, more or less, contain an article of food prepared from eggs and which said article of food then and there contains an added deleterious ingredient which may render such article injurious to health, to wit, said article of food contains added to it a deleterious ingre-
13 dient known as Boric acid.

W. A. NORTHCOTT,
United States Attorney.

Endorsed: #211. In the District Court, Southern District, Northern Division, Ill. United States of America, Libelant, vs. Fifty Cans, More or Less, of Preserved Whole Egg. Amendment to Libel. Filed Aug. 10, 1909. R. C. Brown, Clerk.

14 And afterwards, to-wit; on the 9th day of December, A. D. 1909, the following proceedings were had in said Court in said cause and were entered of record, to-wit:

Order Granting Leave to Thomas & Clarke to Appear Specially

Entered Dec. 9, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

On motion of Thomas & Clarke, a corporation, by Thomas E. Lannen, its attorney, leave is hereby granted said Thomas & Clarke to

appear specially in this cause as prayed for in its motion asking leave to appear specially for certain purposes in said appearance set out.

HUMPHREY, *J.*

And afterwards, to-wit, on the same day there was filed in said Clerk's office, the Special Appearance of Thomas & Clarke and said Special Appearance is as follows, to-wit:

15 *Special Appearance of Thomas & Clarke.*

Filed Dec. 9, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Special Appearance, Waiver of Right, Title and Interest, Affidavit.

Now comes Thomas & Clarke, a corporation, by Thomas E. Lannen, its attorney, and by leave of Court first had and obtained appears specially in this cause for the special purpose of showing this Honorable Court the following matters and things, to wit:

1st. That it, said Thomas & Clarke is the true and bona fide owner of said fifty cans more or less of preserved whole egg, seized by the Marshall of this Court in the above entitled cause.

2nd. That it, said Thomas & Clarke, has relinquished and hereby does waive and relinquish all its right, title and interest in and to said fifty cans more or less of preserved whole egg to Hipolite Egg Co., a corporation with its principal place of business in the city of St. Louis and State of Missouri.

3rd. That it, said Thomas & Clarke, has consented and hereby does consent and agree that said Hipolite Egg Co., might and may appear in this cause on it-, said Hipolite Egg Company's, own behalf, and on its, said Hipolite Egg Company's, own behalf make answer unto the amended libel filed in this cause by the United States of America and otherwise defend said cause as it, said Hipolite Egg Co., may decide.

16 4th. That it, said Thomas & Clarke, does hereby consent that if this Honorable Court finds upon the trial of this cause that the said fifty cons more or less of preserved whole eggs are not confiscable or liable to condemnation and pronounces against the libelant in this cause, that then this Honorable Court may order and decree that the Marshall of this Court deliver and turn over to said Hipolite Egg Co. the said fifty cans more or less of preserved whole egg.

THOMAS & CLARKE,
By THOMAS E. LANNEN,
Its Attorney.

STATE OF ILLINOIS,
County of Peoria, ss:

H. I. Hardin, being duly sworn, deposes and says that he is the agent of Thomas & Clarke, a corporation, and makes this affidavit in behalf of said corporation, and that said Thomas & Clarke is the true and bona fide owner of said fifty cans more or less of preserved whole egg mentioned in the foregoing special appearance and waiver of right, title and interest, and that no other person, firm or corporation is the owner thereof.

H. I. HARDIN.

Subscribed and sworn to before me this 9th day of December, A. D. 1909.

[SEAL.] CLARA L. DAENICK,
Notary Public.

Endorsed: #211—United States vs. Fifty cans more or less of preserved whole Egg—Special appearance—Waiver of Right, title and Interest Affidavit—Filed Dec. 9, 1909. R. C. Brown, Clerk. Thomas E. Lannen, Att'y for Claimant.

17 And afterwards, to-wit; on the 9th day of December, A. D. 1909, there was filed in said Clerk's office the answer of Hipolite Egg Company, to the Libel as amended and said answer is as follows:

Answer of Hipolite Egg Co.

Filed Dec. 9, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Answer.

To the Honorable Judge of said Court:

Now comes Hipolite Egg Company, a corporation, by Thomas E. Lannen, its attorney, intervening for its interests in said fifty cans, more or less, of preserved whole egg, and for answer to the libel and information as amended, of the United States alleges and shows to the Court the following:

1st. Said claimant admits the allegations contained in Article 2 of said libel as amended.

2nd. Said claimant denies all the allegations contained in Article 3 of said libel as amended, except the allegation therein that said preserved whole eggs contained boric acid, but claimant alleges that

said boric acid is not a deleterious ingredient and does not and will not render said eggs injurious to health.

3rd. Said claimant answering the allegations contained in Article 4 of said libel as amended admits said eggs were transported from St. Louis, in the State of Missouri, to Peoria, in the State of Illi-
18 nois, but said claimant alleges that said preserved whole eggs were not so transported as aforesaid for sale, nor in violation of the said Act of Congress approved June 30th, A. D. 1906.

And all and singular the premises are true, wherefore claimant prays that this Honorable Court pronounce against the libellant aforesaid.

HIPOLITE EGG COMPANY,
By THOMAS E. LANNEN,
Its Attorney.

STATE OF ILLINOIS,
County of Peoria, ss:

Thomas E. Lannen, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and that the same is true, as he verily believes.

THOMAS E. LANNEN.

Subscribed and sworn to before me this 8th day of December, A. D. 1909.

[SEAL.] J. T. B. JONES,
Dep. Clk U. S. Dist. Court.

Endorsed: #211. District Court of United States, Southern District of Illinois. U. S. vs. 50 Cans, more or less, preserved whole eggs. Answer to Libel as amended. Filed Dec. 9, 1909. R. C. Brown, Clerk. Thos. E. Lannen, Att'y, 1027 1st Nat. Bank Bldg., Chicago, Ill.

19 And afterwards there was filed in the office of the Clerk of said Court, the replication of the Libelant to the amended answer of the Claimant, Hipolite Egg Company, and said replication is as follows:

Replication.

Filed Dec. 9, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

To the Honorable J. Otis Humphrey, Judge of said Court:

The replication of the United States of America, Libelant, to the amended claim and answer of the Hipolite Egg Company, respond-

ents and claimants, alleges that they will ever aver, maintain and prove their libel to be true, certain and sufficient; and that the said claim and answer of said claimants and respondents is uncertain and insufficient.

And libelants humbly pray as in and by their libel they have already prayed.

W. A. NORTHCOTT,
United States Attorney.

Endorsed: 211. In the District Court Southern Dist. of Illinois. United States of America vs. Fifty cans more or less of preserved whole eggs. Replication of Libelant to amended answer of Claimant Hipolite Egg Co. Filed Dec. 9, 1909. R. C. Brown, Clerk. W. A. Northcott, U. S. Att'y.

20 And afterwards, to-wit: on the same day came the parties, by their attorneys and stipulated that this cause be tried before the Court, without the intervention of a jury and said stipulation is as follows;

Jury Waiver.

Filed Dec. 9, 1909.

In the District Court, Northern Division, Southern District of Illinois.

211.

THE UNITED STATES
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGGS.

Seizure Under Pure Food and Drug Act.

It is hereby stipulated by and between W. A. Northcott U. S. Attorney and Thomas E. Lannen counsel for the claimant in the above entitled cause that the issues joined in said cause may be tried by the Court without the intervention of a jury and a jury is hereby waived.

W. A. NORTHCOTT,
U. S. Atty.
THOMAS E. LANNEN.
Attorney for Claimant, Hipolite Egg Co.

Endorsed: 211. United States vs. Fifty cans more or less of preserved whole eggs. Stipulation as to waiver of Jury. Filed Dec. 9, 1909. R. C. Brown, Clerk.

21 And afterwards, to-wit, on the 9th day of December, A. D. 1909, the following further proceedings were had in said couse in said Court and were entered of record as follows:

Proceedings First Day of Trial.

THURSDAY, *December* 9, *A. D.* 1909.

Court met pursuant to adjournment.
Present: Honorable J. Otis Humphrey, District Judge.

Gen. No. 211.

UNITED STATES OF AMERICA
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

And now on this 9th day of December, A. D. 1909, comes the United States, the plaintiff in this case by W. A. Northcott, Esq., United States Attorney and by H. A. Converse and Jos. H. Story, Assistant United States Attorneys for the Southern District of Illinois and comes, also, the defendant by Thomas E. Lannen, its attorney. And issue being joined this cause is submitted to the Court for trial, without the intervention of a jury, a jury being expressly waived; and the Court having heard part of the evidence in this case and the hour for adjournment having arrived it is ordered by the Court that the further trial of this case be postponed until nine o'clock tomorrow morning.

22 And afterwards, to-wit, on the 10th day of December, A. D. 1909, the following further proceedings were had in said Court in said cause and were entered of record as follows:

Proceedings Second day of Trial.

FRIDAY, *December* 10, *A. D.* 1909.

Court met pursuant to adjournment.
Present: Honorable J. Otis Humphrey, Judge.

In Rem. No. 211.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

And now on this day come again the parties, by their attorneys and thereupon the trial of this cause is resumed; and the Court having heard the evidence in the case and the arguments of counsel and being fully advised in the premises, finds the issues for the Libelant.

23 And afterwards, to-wit, on the 20th day of December, A. D. 1909, the following further proceedings were had in said Court in said cause and were entered of record as follows:

Decree entered Dec. 20, 1909.

In the District Court of the United States, Southern District of Illinois, Northern Division.

In Rem. No. 211.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Decree of Court.

This cause having regularly come on to be heard on the 10th day of December, A. D. 1909, at the City of Peoria, and it appearing to the Court that in accordance with the prayer of the libel filed herein, the United States Marshal for the Southern District of Illinois, under the authority of a writ of monition duly issued, seized upon the premises of Thomas and Clarke, a corporation doing business in the City of Peoria, State of Illinois, Fifty-two cans of preserved whole egg, prepared by the Hipolite Egg Company of Saint Louis, Missouri, and thereupon gave due notice of said seizure and publicly advertised the same as required by law in such cases, and has since held in his custody said preserved egg so seized, and the said Thomas and Clarke having entered its appearance specially and having
24 waived all right and title to said seized egg, and having consented that the Hipolite Egg Company might appear as the claimant and defend both in its own right as well as in behalf of the said Thomas and Clarke, and the said claimant having filed its answer and issue having been joined, and the libelant appearing by W. A. Northcott, United States Attorney, and Henry A. Converse, Assistant United States Attorney, and the claimant appearing by Thomas E. Lannen, Esq., and all parties interested having first stipulated in writing that the cause might be tried by the Court without the intervention of a jury, and the evidence having been presented and the argument of counsel heard, the Court finds:—

That said preserved whole egg is a food product intended for the consumption of human beings.

That said food product was shipped from the City of Saint Louis, in the State of Missouri, to the City of Peoria, in the State of Illinois, and remained within this jurisdiction unsold, and in the original and unbroken package.

That said food product is adulterated within the meaning of the act of June 30, 1906, (34 Statutes at Large 771) in that it contains two per cent. of Boric acid added as a preservative.

That said Boric acid is a deleterious ingredient which may render said article of food injurious to health.

That said food product is illegally held within the jurisdiction of this court and is confiscable and liable to condemnation as provided by said Act of June 30, 1906.

25 Now, therefore, it is ordered adjudged and decreed, that thirty days after the filing of this decree, the United States Marshal shall take said Fifty-two Cans of Preserved Whole Egg and totally destroy the same and that judgment be entered against the claimant for the costs in said case and execution issue therefore, and that the United States Marshal shall make due report of how he has executed this order of this Court, and shall report his bill of costs for said seizure, drayage, storage, advertising, destruction and all other necessary expenses incurred by him in and about said seizure, which said costs of the United States Marshal shall be included in the court costs of this case.

HUMPHREY, *Judge.*

Endorsed: Filed Dec. 20, 1909. R. C. Brown, Clerk.

26 And afterwards, to-wit; on the 14th day of January, A. D. 1910, the following further proceedings were had in said court in said cause and were entered of record as follows;

Order Extending Time for Appeal, etc.

FRIDAY, *January* 14, *A. D.* 1910.

Present Honorable J. Otis Humphrey, Judge.

In Rem. No. 211.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG; HIPOLITE EGG COMPANY, Claimant.

Order.

Upon stipulation of the United States of America, libelant in the above entitled cause, and Hipolite Egg Company, claimant in the above entitled cause, by their respective attorneys,

It is ordered by the Court that the time of said Hipolite Egg Company for praying an appeal and suing out a writ of error and for obtaining the Judge's signature to and filing of a certificate of jurisdictional questions, and for settling and filing bill of exceptions and for entry and filing of special findings of facts, in the above entitles cause, may be and the same is hereby extended to and including February 15th, A. D. 1910.

And afterwards, to-wit, on the 11th day of February, A. D. 1910, came Hipolite Egg Company, the Claimant herein, by Thomas E. Lannen, its attorney, and filed in said Clerk's office its Petition for Writ of Error and said Petition is as follows, to-wit;

27 *Petition for Writ of Error.*

Filed Feb. 11, 1910.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the District Court of the United States in and for said District.

No. 211.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Petition for Writ of Error.

Comes now Hipolite Egg Company, claimant, in above entitled cause, by Thomas E. Lannen, its attorney, and complains that in the record and proceedings had in said cause and also in the rendition of the decree in the above entitled cause, in the District Court of the United States, for the Southern District of Illinois, on December 20th, 1909, confiscating said fifty cans, more or less, of preserved whole egg, and assessing the costs of said proceedings against said claimant, manifest error hath happened to the great damage of said claimant, Hipolite Egg Company.

Wherefore said claimant prays for the allowance of a writ of error, that a citation issue, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States, and said claimant presents and files herewith its assignment of errors in this behalf.

THOMAS E. LANNEN,
Attorney for Hipolite Egg Company, Claimant.

Endorsed: Filed Feb. 11, 1910. R. C. Brown, Clerk.

28 And on the same day there was filed by said claimant its Assignment of Errors, which is as follows;

Assignment of Errors.

Filed Feb. 11, 1910.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the District Court of the United States in and for said District.

No. 211.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Assignment of Errors.

To the Honorable J. Otis Humphrey, Judge of said Court:

Comes now, Hipolite Egg Company, claimant in the above entitled cause, by Thomas E. Lannen, its attorney and presents and files herein assignment of errors upon which it will rely on its appeal and writ of error from the decree heretofore entered by the Court in the above entitled cause confiscating said fifty cans more or less, of preserved whole egg, and assessing the costs of said proceeding against said claimant.

First. Said District Court erred in overruling the motion made by claimant at the close of the evidence for libellant, to dismiss said libel and information for want of jurisdiction.

Second. The District Court erred in overruling the motion of claimant made at the close of all the evidence, to dismiss said libel for want of jurisdiction.

Third. The District Court erred in entertaining jurisdiction of the subject matter of said suit and entering a final decree upon the merits.

Fourth. The District Court erred in entering a personal judgment against said claimant, Hipolite Egg Company, for the costs
29 of said prosecution.

In order that the foregoing assignment of errors may appear of record the said claimant presents the same to the Court, with its petition for appeal and writ of error and prays a reversal of said decree on the ground that said District Court was without jurisdiction in the premises as aforesaid.

THOMAS E. LANNEN,
Attorney for Hipolite Egg Company, Claimant.

Endorsed: United States District Court, Southern District of Illinois, Northern Division. No. 211, In Rem. United States of America vs. Fifty cans, more or less, of preserved whole egg. Filed Feb. 11, 1910. R. C. Brown Clerk. Assignment of Errors. Law offices of Lannen & Hickey, 1027 First National Bank Bldg., Chicago, Illinois.

And at the same time, to-wit; on the 11th day of February, A. D. 1910, said Claimant, by its attorney, filed in said Clerk's office its Bill of Exceptions and said Bill of Exceptions is as follows:

30 In the District Court of the United States for the Southern District of Illinois, Northern Division, October Term, A. D. 1909.

UNITED STATES OF AMERICA
vs.
FIFTY CANS, MORE OR LESS, PRESERVED WHOLE EGGS.

Appearances: Hon. W. A. Northcott, U. S. Attorney; H. A. Converse, Esq., and J. H. Story, Esq., Assistant U. S. Attorneys, Attorneys for plaintiff.
Thomas E. Lannen, Esq., Attorney for defendant.

Be it remembered that heretofore, towit, on the 9th day of December, A. D. 1909, being one of the days of said term of said Court, the above entitled cause came on to be heard before his Honor, J. Otis Humphrey, Judge of said Court, without the intervention of a jury, the jury being waived.
And thereupon the plaintiff to maintain the issues on its part introduced the following evidence, towit—

JOHN J. MCMANUS, being first duly sworn, in answer to interrogatories propounded by Mr. Converse, testified as follows, towit—

Q. State your name to the Court, please?
A. John J. McManus.
Q. What position do you hold with the Department of Agriculture?
A. Food and Drug Inspector, Bureau of Chemistry.
31 Q. State in a general way, what your duties are?
A. Collection of samples, investigations and inspections of factories as directed by the Bureau.
Q. Where are your headquarters?
A. Chicago, Illinois.
Q. Did you, in the course of your official duties, make any inspection here in the city of Peoria on or about March 1909?
A. Yes.
Q. Did you go upon the premises of Thomas and Clarke?
A. Yes.
Q. What business did you find Thomas and Clarke engaged in?
A. In the cracker business, bakery business.
Q. Is it a large business or small business?
A. It is considered a large business.
Q. Did you see any product that was being manufactured there on the premises?
A. Yes, saw their articles that were manufactured.
Q. State what character of products you saw?
A. Cookies and crackers at the time.

Q. Did you see any of them in the course of manufacture?
A. Yes, I saw some.
Q. While you were there, Mr. McManus, did you secure a package of preserved whole egg prepared by the Hipolite Egg Company of St. Louis, Mo.?
A. I bought a can from them, an original unopened can.
Q. What size can was it that you purchased?
A. Forty pound can.
Q. Have you kept a memorandum of just what you purchased there?
A. Yes.
Q. Have you got your memorandum with you?
A. Yes.
Q. Take it out and refer to it to refresh your memory. What was the date of purchase?
32 A. March 3, 1909, 10 A. M.
Q. What was the label on the can?
A. Printed label read: "Shake well before using. Preserved whole eggs prepared by Hipolite Egg Co., 7 South Second St., St. Louis, Mo. Guaranteed under Food and Drugs Act June 30, 1906; Serial #20595." Also rubber stamp over that label read: "For Thomas & Clarke, Peoria, Ills."
Q. Did you see any of this product open and in use?
A. Yes, I did.
Q. State to the Court how it was opened and what they were doing with it?
A. There was an open can, and as I remember there was a small bowl of the product on the bench there in the baking and mixing room.
Q. Did you see any of this product used in the food at the time?
A. Didn't see it being put in the food.
Q. How much did you pay for this can?
A. $5.75 cash.
Q. And from whom did you secure it; what was the individual's name?
A. Mr. H. I. Harding.
Q. Was Mr. Harding there working and holding himself out as an employé of Thomas and Clarke?
A. I was introduced to him as the manager.
Q. Now can you describe its condition with reference to whether it was an open or sealed can, or what the seal on the can was?
A. It was an unopened can, stoppered with a cork and covered with a wax-like substance on top; examination showed it had not been opened.
Q. Was there anything about the can which showed that it had been opened?
A. No, there was nothing.
33 Q. After you purchased this can, what did you do with it?
A. I put two seals on it and also a paster and shipped it to the Bureau of Chemistry.

Q. What was the character of the seal you put on it?

A. Two seals bearing I. S. #23119 A; my name and the date March 3, 1909.

Q. Did you open the can yourself?

A. No, I did not.

Q. When you shipped it to Chicago was it in the same condition as when you purchased it?

A. Exactly.

Q. Were you present here in the city of Peoria when the service of a monition was made by the U. S. Marshal upon the goods in the possession of Thomas and Clarke?

A. Yes sir.

Q. What date was that?

A. March 11, 1909.

Q. Did you, at that time, secure another can?

A. Secured a can from Deputy U. S. Marshal S. O. Tripp.

Q. What size can?

A. Forty pound unopened, sealed can.

Q. What did you do with that can?

A. Shipped that to the Bureau of Chemistry.

Q. Did you open it?

A. No, I did not.

Q. What would you say as to the appearance of that can being the same as the first can you purchased?

A. It had all the appearance of such.

Cross-examination by Mr. LANNEN:

Q. When you called on Thomas and Clarke and purchased this first sample of preserved whole egg, which you have testified to, did you say anything to Thomas and Clarke about being an inspector of the U. S. Government?

A. Yes, I did; I showed them my credentials.

Q. And told them you were an inspector?

A. An inspector.

34 Q. And you requested him to sell you that can of preserved whole egg as an inspector of the U. S. Government of Agriculture; is that right?

A. Yes. They expressed a willingness to have it examined if we desired to collect a sample.

Q. Then the sample, which you purchased from them, at that time, was purchased by you for the special purpose of being analyzed by the Department of Agriculture?

A. Yes, that was my purpose.

Q. Did Mr. Hardin say anything to you at that time about the use to which they were putting those eggs?

A. Yes, as I remember, he told me they were being used in certain kinds of cookies and cakes.

Q. That was all he said to you about what Thomas and Clarke was doing with those eggs, was it?

A. There was considerable conversation which I do not recall; that is all I recall.

Q. So far as you remember that is all that was said? I mean about the use to which they were put?
A. Yes; that was all that was said, that they were used in the products they made.
Q. For manufacturing pies, cakes and crackers and things of that kind?
A. Yes.

Redirect examination by Mr. CONVERSE:

Q. Did you secure from Mr. Hardin within the last day or two the paper purporting to be the bill of sale, way-bill, and invoice, of this particular shipment of preserved whole egg, which they had?
A. Yes sir.
Q. I wish you would produce those, if you please, and I will have them marked for indentification.

(Witness produces invoice, warehouse receipt, expense bill and way bill.)

Mr. CONVERSE: Will the reporter kindly mark these various papers for indentification as follows, towit:

The invoice from The Hipolite Egg Company to Thomas & Clarke as Exhibit 1;

The warehouse receipt from the St. Louis Refrigerating and Cold Storage Company, as Exhibit 2;

The expense bill, dated November 20, 1908, showing payment from Thomas and Clarke to the Eagle Packet Company, as Exhibit 3; and

The way-bill, dated November 16th, showing shipment from St. Louis, Mo., by the Steamer Bald Eagle, of 130 cans marked Egg Syrup, as Exhibit 4.

HOWARD I. HARDIN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Converse and testified as follows, towit:

Q. State your name to the Court, please?
A. Howard I. Hardin.
Q. Where do you live?
A. Peoria, Ill., North Garfield Ave.
Q. What is your business?
A. Cracker business.
Q. Are you connected with Thomas and Clarke?
A. Yes sir.
Q. Of Peoria, Ill.?
A. Yes sir.
Q. In what capacity?
A. As a director of the company and superintendent; in fact, in charge of the plant.
Q. Were you in charge of the plant during the month of March, 1909?
A. Yes sir.

Q. Do you remember the occasion of Mr. McManus, the gentleman who just testified here, coming to your place?

A. Yes sir.

Q. What were you manufacturing in your plant during the spring and winter of 1908 and 1909?

A. Full line of cracker and cakes, as are made by all
36 steamery bakeries, cracker bakeries..

Q. Were these crackers and cakes that you manufactured intended for food?

A. Exactly.

Mr. LANNEN: That is objected to, and I ask that it be stricken out of the record, on the ground that it is immaterial here. We are trying a case about some preserved whole eggs.

The COURT: I suppose it would be immaterial what his crackers are intended for unless you propose to follow it up and show that this product was used in the manufacture of them.

Mr. CONVERSE: We expect to prove that this product was used in the manufacture of his crackers and cakes.

The COURT: With that statement you may have it.

Objection overruled, to which ruling of the Court, counsel for defendant then and there excepted.

Q. Did your firm, Mr. Hardin, manufacture anything for sale other than food products?

A. No sir.

Q. Did you have occasion, Mr. Hardin, to purchase from the Hipolite Egg Company of St. Louis, Mo., an egg product?

A. Yes sir.

Q. For what purpose did you purchase this egg product?

A. Manufacturing purposes.

Q. Did you purchase it for the purpose of putting it in the food products which you were manufacturing in your plant for sale to the public?

A. Some of them.

Q. Did you intend to use any of this egg product, or did you use any of this egg product for any other purpose than putting it in food products?

A. No sir.

Q. When you entered into your business relations with the Hipolite Egg Company with reference to this egg product with whom did you do business?

A. Mr. W. H. Hipolite.

37 Q. Is that the gentleman who is present here today?

A. Yes sir.

Q. Where did you meet him?

A. In my office.

Q. In the city of Peoria?

A. Yes.

Q. When did you make your contract with him for this egg product as near as you can remember?

A. In the spring of 1908, early spring.

Q. When Mr. Hipolite met you at your place of business, I wish

you would state to the Court, in a general way, what he said to you and what the proposition was so that we may know just what the terms were on which you entered into business relations with him, as near as you can recall it?

A. Explained the egg, how it could be used in baking process; we had tried a sample of it and gave it a severe test and found that it was all right in every way, so far as we could, before anything was purchased from him.

Q. Who had furnished you the sample?

A. Mr. Hipolite.

Q. What size sample was it?

A. In forty-two pound cans.

Q. Did Mr. Hipolite tell you what the method of manufacture was?

A. He did not.

Q. Did you furnish Mr. Hipolite with any formula, or plan, or method for manufacturing this egg product?

A. We did not.

Q. Did you, in any way, direct or supervise, or suggest what should go into this corporation, or how it should be manufactured?

A. No, indeed.

Q. Is it not a fact Mr. Hardin, that the entire method and formula, or plan of manufacture was Mr. Hipolite's without any instructions from you?

A. Yes sir.

38 Q. Did you enter into any written contract with Mr. Hipolite?

A. Yes sir.

Q. Have you got that contract with you?

A. No sir.

Q. Where is the contract?

A. It is in my office, or may be I have it with me. Yes, I have it here.

Q. Will you let me see it, please?

A. I will.

Q. Is this memorandum, which you produce, the written agreement which was entered into by you and Mr. Hipolite for the purchase of this egg product, which you have spoken about?

A. Yes, that is a copy.

Q. It was written in duplicate?

A. Yes.

Q. The duplicate was kept by Mr. Hipolite and the original by yourself?

A. I think it was vice versa.

Q. And each have a copy?

A. Yes.

Q. This was signed up in the city of Peoria?

A. Yes sir.

Mr. CONVERSE: I desire to offer this contract in evidence and ask that it be marked Exhibit 5.

Said contract was so marked and admitted in evidence and is in the words and figures following, towit: -

"EXHIBIT 5.

(Letter Head.)

Thomas & Clarke.
306-8-10-12 South Washington St.

PEORIA, ILL., *May*, 14, '08.

Messrs. Thomas & Clarke, Peoria, Ill.

GENTLEMEN: We hereby agree to sell to you 400 cans of
39 Hipolite Whole Egg at 13½ cents per pound, net, F. O. B. St. Louis, Mo. These to be delivered to the St. Louis Refrigerator and Cold Storage Company and paid for on delivery of Cold Storage Company's receipts to Thomas and Clarke. Each can to contain 42 pounds net, and quality guaranteed; also guaranteed under Pure Food Laws of Illinois and Missouri. We also agree to take same from said Storage Company on your order as wanted, making shipments to you as required; without charge for drayage; maximum storage not to exceed five cents per can per month.

Yours very truly,

HIPOLITE EGG CO.,
Per W. H. HIPOLITE.

Accepted as contract by Thomas & Clarke this 14th day of May 1908.

THOMAS & CLARKE,
Per H. I. HARDIN."

Q. After entering into that contract with Mr. Hipolite, did you receive an invoice with these goods?
A. We did.
Q. Please examine plaintiff's Exhibit 1 and state what that is?
A. This is the original invoice for the shipment.
Q. Dated when?
A. May 23, 1908.
Q. For how many cans?
A. 370 cans.
Q. What is the amount?
A. $2097.90.
Q. Did you pay that invoice?
A. We did.
Q. On what date?
A. June 1st, 1908.
Q. Do you know Mr. Hardin, what the expression, "Hipolite Whole Egg #1," means?
A. That is the first quality, as I understand it.

Q. That is inserted here in lead pencil; was that at your
40 direction?

A. No sir, the whole invoice is made in lead pencil, is it not?

Q. Yes. *Q.* Were you furnished with a warehouse receipt?

A. Yes sir.

Q. Examine Exhibit #2 and state what that is?

A. The St. Louis Refrigerating and Cold Storage Company's receipt for 370 cans of eggs.

Q. These notations on the back of Exhibit 2 are notations of your own are they?

A. Yes sir.

Q. And indicate the various periods and quantities in which you received the shipments of the Hipolite Whole Egg, do they?

A. Correct; the first date is the shipping date, and the second, is the receiving date if I remember right.

Q. I notice these shipments extended through the summer of 1908 until November 16, 1908, when 130 cans were received; why were these shipments made in such quantities during that period of the year?

A. The small quantities, 20 and 15 can lots, took them out as long as the boat was in operation between St. Louis and Peoria because the freight bill was much less and on the last trip of the boat we received the large amount.

Q. Out of this 130 cans, you sold, did you not, to Mr. McManus, the sample which he bought?

A. Yes sir.

Q. Did you receive an expense bill showing the shipment of 130 cans and pay freight on the same?

A. Yes sir.

Q. Examine Exhibit 3; is that the expense bill?

A. Yes.

Q. Did you also receive the bill of lading for this last 130 cans?

A. Never had a bill of lading on any of it.

Q. What is Exhibit 4, which I hand you?

41 A. It is what we call a shipping receipt; it isn't a bill of lading.

Q. From whom did you receive this shipping receipt?

A. It is mailed to us by Hipolite Egg Company.

Q. Did Mr. Hipolite tell you anything about the composition of this article?

A. No sir, only that it was regular eggs preserved.

Q. Did he say anything to you as to whether or not there was anything in it other than egg?

A. Yes sir; that it was a preserved egg; I know there was something in it beside egg.

Q. Did he say anything to you as to whether or not in addition to the preservative, there was anything in it other than egg?

A. No sir.

Q. Did he tell you anything about the manufacture, as to how this whole egg was made, or did you know?

A. In our conversation, I understood that the eggs were broken and put into a vat of some sort with a preservative and slightly mixed and then put into the can; that was my impression.

Q. The can that you sold Mr. McManus, was it a sealed can?

A. Yes sir.

Q. In the same condition as when you received it from the factory?

A. Yes sir.

Q. Had any of the cans which were seized by the U. S. Marshal on the libel suit in this case been opened at the time the Marshal seized them?

A. No sir.

Q. Were they in the same condition as when you received them by shipment from Missouri?

A. Yes sir.

Q. State to the Court, in a general way, how you used this egg in manufacturing your food products?

A. Used so many ounces, or so many pounds to a certain
42 amount of flour with other ingredients in the course of the manufacture; principally the same as you would use shell eggs.

Q. Instead of using eggs by the dozen or eggs in the shell, would you take an equal amount of the liquid and put it in your products?

A. In other words, we don't use eggs by the dozen, but by the gallon, quart, pint and so on, and would use them the same as we would use that.

Q. Do you know about how many eggs it takes to make a pound?

A. About 14 or 13; it depends upon the size of the egg. We figure eighty eggs to a gallon.

Q. What does a gallon weigh?

A. Couldn't tell you.

Cross-examination.

By Mr. LANNEN:

Q. This written agreement, which you had with The Hipolite Egg Company says that the Hipolite Egg Company agrees to take the said eggs, or take some from said Storage Company on your order as wanted, making shipment to you as required, without charge for drayage; maximum storage not to exceed five cents per can per month. Who was to pay that maximum storage; who was to pay the storage on those eggs?

A. Thomas & Clarke paid the storage; they were our eggs from the time we purchased them.

Q. Now you purchased originally under this agreement 300 and how many cans?

A. 370, I think.

Q. I will ask you to state on whose order those different consignments were shipped to you?

A. My own order.

Q. Just describe the circumstances, what you would do when you wanted some of those eggs?

A. If I thought I had time, I made a regular requisition
43 on the Storage Company and send it to Hipolite for a delivery to the boat; sometimes, when time was short, I wired both the Storage Company and Mr. Hipolite so they would turn the goods over to Mr. Hipolite on my order.

Q. All Mr. Hipolite had to do with that transaction, as I understand it, was to go to the Storage Company with your order for your goods on the Storage Company and take the amount of eggs that you had ordered out from that Storage Company to the shipping line and ship those eggs to you? That is all that the Hipolite Egg Company had to do with the taking of them out of the warehouse and shipping them?

A. Exactly. He was a good fellow and did the draying for us, that is all.

Q. Did he receive any compensation for that?

A. No.

Q. Now, Mr. Hardin, I understand that you received the cold storage receipt for the whole amount of eggs that was manufactured under this agreement from the Storage Company on May 21, 1908?

A. I think that is the date.

Q. And that after that date, on June 1st, 1908, you paid the Hipolite Egg Company in full for all of those eggs that had been placed in the cold storage plant in St. Louis?

A. Yes, the date June 1st, was on account of the invoice allows ten days for payment; it was paid within ten days of the date of the invoice.

Q. In whose name were those goods stored in the warehouse?

A. Thomas and Clarke.

Q. Who paid the insurance on it, if there was any insurance on it?

A. Thomas and Clarke.

Q. Was there any insurance on those eggs?

A. Yes.

Q. Thomas and Clarke paid the insurance?

A. Yes.

44 Q. Now when you gave this sample to Mr. McManus, the inspector in this case, that was given to him out of the consignment of 130 cans, as I understand it?

A. Yes sir.

Q. Will you describe the circumstances surrounding that particular shipment of 130 cans?

A. You mean why it came in 130 can lot?

Q. Yes.

A. Because it was the balance of the amount we had in storage in St. Louis and it was the last trip of the boat and that was the reason we ordered it out to save some freight on the shipment.

Q. What did you do to get those eggs here?

A. Gave Mr. Hipolite, the Hipolite Egg Co., an order on this cold storage company for the balance of the goods stored there, which was 130 cans.

Q. You received the 130 cans at one time?

A. Yes sir.

Q. Just describe the condition those cans were in at the time you received them?

A. The can looked intact; it was corked and sealed with wax.

Q. There were 130 separate cans, as I understand it.

A. Yes sir.

Q. They were not crated or anything of that kind?

A. Some were and some were not.

Q. Describe that crating?

A. Some of them had square frames built around the can to protect the can.

Q. But that crate was only around one can, as I understand it?

A. Oh, yes.

Q. There were no number of cans crated together?

A. No.

45 Q. When you received that consignment of eggs, those 130 cans, what did you do with those eggs?

A. Stored them in a cool place in our basement.

Q. In Peoria?

A. Yes sir.

Q. Where you manufacture these crackers and biscuits?

A. Yes sir.

Q. Did you use any of those eggs in the manufacture of your crackers?

A. No sir. Don't use eggs in crackers.

Q. Did you use up any of those eggs?

A. Oh, yes.

Q. Now just describe what you would do when you wanted to use some of those eggs and what you would use them in?

A. We would open a can and pour the eggs out and thoroughly mix it and take out the preparation you wanted for each batch of flour and use it and put it in the mixer. You have to thoroughly mix that kind of product because the yolk always settles in the bottom and you would have to mix it thoroughly.

Q. You would take those eggs out of the can and stir it up and when you say the can, you mean the original container in which those eggs were shipped from St. Louis?

A. Exactly.

Q. Then you would put those eggs, as I understand it, into a large batch of dough?

A. Yes sir.

Q. And mix them in with the dough?

A. Yes sir.

Q. Out of that dough you would make what?

A. Make vanilla wafers or something of that sort, cookies and cakes.

Q. How many of those 130 cans had you used at the time that Mr. McManus secured this sample from you, to which he had testified?

A. I should judge ten or fifteen; probably more than that; I couldn't answer that exactly.

Q. You had used ten or fifteen of those 130 cans in the
46 manufacture of your vanilla wafers and things of that kind?
A. Yes, up to the first time he came in there we used some; don't know just how many.
Q. What were you going to do with all of the balance of those 130 cans which you had in your basement at that time?
A. Expected to use them.
Q. How did you expect to use them?
A. In the same manner I have described.
Q. For making vanilla wafers?
A. Not altogether vanilla wafers; any kind of our line of what we call cookies that require eggs.
Q. Did you sell any of those original 130 cans which you received from St. Louis in that last consignment?
A. Only to Mr. McManus for a sample.
Q. Did you intend to sell any of those cans?
A. No sir.
Q. Did you intend to sell any of those eggs at all?
A. Not at all.
Q. What did you purchase those eggs from Mr. Hipolite for?
A. For manufacturing purposes.
Q. And when you say manufacturing purposes, you mean the manufacturing purposes which you have described here?
A. Exactly.
Q. You didn't purchase any of those eggs from the Hipolite Egg Company, as I understand it, for the purpose of selling those eggs as eggs?
A. No sir.
Q. You never shipped any of those eggs from the city of St. Louis to the city of Peoria for the purpose of selling those eggs?
A. Never.
Q. You never in fact did sell any of those eggs?
A. Never outside of this can I sold to Mr. McManus for a sample.
Q. Just state what was said at that time; what took place when you sold that can?
47 A. Mr. McManus came into the factory and we talked over things and looked around and finally we brought up this subject of eggs ourselves and asked him what he knew about it. He said he was sorry he didn't know anything about it, but would find out for us, and we asked him to take a sample and find out and let us know if it was all right for us to use that. He asked me if we wouldn't let him have a can and I said, "certainly," and I helped crate the can myself and get it ready to ship and saw him put the seals on it.
Q. He told you at that time he was an inspector?
A. Yes sir.
Q. Food Inspector of the U. S. Department of Agriculture?
A. Yes sir.
Q. He said at that time that he wanted that can of eggs for the purpose of having them analyzed, testing them?

A. He wanted them to send away for a sample; I supposed it was for analysis.

Q. You supposed it was for the purpose of analysis?

A. Yes, because we brought the matter up and asked him to have it done.

Q. What condition were those eggs in, if you know, at the time they were seized by the Marshal of this Court on your premises?

A. Every can that had been opened up to that time were in excellent condition.

Q. What do you mean by excellent condition?

A. I mean sweet, absolutely sweet, in good shape when they were stirred up, no bad odor, or anything of that sort.

Q. You are handling eggs right along in your business?

A. Yes sir.

Q. You have handled a great many eggs, I presume, in the
48 bakery business?

A. Yes, indeed.

Q. I presume you are able to tell a good, sweet, fresh egg when you see it and smell it?

A. Yes sir, when I smell it.

Q. In your judgment, would you consider those eggs were good, fresh, sweet eggs?

A. Very much; in fact better eggs than you could go into the market and buy almost.

Q. In so far as freshness and sweetness were concerned?

A. Yes sir.

Q. What kind of packages were these eggs put up in?

A. Some in round and some in square.

Q. Were they glass containers or tin?

A. Tin.

Q. What kind of fastener or stopper did they have?

A. Cork and wax seal.

Q. You had received and used up all the eggs which you purchased under this agreement with the Hipolite Egg Company with the exception of these 130 cans which you received in the last consignment, is that true?

A. Yes sir. Had used up every shipment prior to that 130.

Q. And at the time this sample was taken by Mr. McManus, and at the time that the Marshal of this Court seized the fifty cans, more or less of preserved whole eggs, the only cans you had on your premises were the cans that you received in that last consignment of 130 cans?

A. Yes.

Q. This offer contained in this agreement of May 14, 1908, was made on that day in the city of Peoria, as I understand it, is that true?

A. Yes.

Q. And the acceptance of the same on May 14, 1908, was also made on that day in the city of Peoria?

A. Yes.

Q. In other words, this whole agreement was closed here in the city of Peoria?

A. Yes.

49 Redirect examination by Mr. CONVERSE:

Q. Although the cans of preserved whole eggs had been paid for by you and were in the cold storage at St. Louis, when it came to a matter of shipment, the handling of the eggs from the cold storage to the transportation company was done by the Hipolite Egg Co. at your direction, was it not?

A. Yes.

Q. And under the terms of your contract the handling by the Hipolite people in the making of the actual shipment was done without charge to you for any drayage in the city of St. Louis?

A. Yes sir.

Q. Now the can which you sold to Mr. McManus as a sample was one of the regular, usual, ordinary packages, was it not—the same as the others?

A. The packages differed some.

Q. This was an original package in itself?

A. Yes sir.

Q. Which had not been opened?

A. No sir.

Q. And none of the contents extracted?

A. No sir, not to my knowledge.

Q. The cans that were seized by the U. S. Marshal, what will you say about them, as to whether or not they were in the same original packages as when you received them?

A. They were.

Q. And that at the time the Marshal seized them upon your premises, they were in your possession and custody and had not been sold, had they?

A. No sir.

Q. Now you stated that the egg product, upon being opened, as far as its appearance went and its odor, etc., that it was fresh and in good condition?

A. As far as we could see it was always sweet; there was never any bad odor.

Q. That was so of the eggs that you used even in March, which you had purchased and paid for almost a year before; that is

50 true, is it not?

A. Yes sir, on all the cans of eggs.

Q. You said that the eggs under this condition were sweeter and appeared in better condition than eggs that you could buy on the market?

A. The majority of them, yes.

Q. Do you mean to say, Mr. Hardin, that from appearance and general character of these preserved eggs, that they were better to use for cooking purposes than the egg that you would buy fresh on the market?

A. If you will let me explain what I call fresh. When you go on

the market and buy fresh eggs you don't get every egg fresh; you have to break them separately and if one slips through what we call a strong or musty egg, it will spoil a whole lot; these eggs were always uniform and always sweet.

Q. Then one of the difficulties you have had in manufacturing food products, in purchasing eggs which you had to break and mix yourself, was the danger of not getting eggs uniform?

A. Exactly.

Q. Wouldn't a person who manufactured eggs in large quantities, in a wholesale business, and put them up in quantities as large as 370 cans at a time, containing 42 pounds to the can, have just exactly the same difficulty of purchasing, on the market, uniform eggs that you would?

A. I would not think so, because their eggs are bought in the spring when eggs are fresh and plenty of them in the market. When we have to go on the market and buy eggs, for instance now, you can't buy strictly fresh eggs; and all of this stuff is put up when the market on eggs is low and an abundance of eggs.

Q. What was your real object then in using a preserved egg instead of buying the egg on the market yourself?

51 A. As they were more uniform. Year in and year out there were times in the year when we could have bought fresh eggs for practically the same price, what they term fresh eggs; shell eggs I will call them. But these were fresh eggs; you had no bad oder. It was more convenient and more useful.

Q. Was the matter of price an element?

A. No sir; it was in one way in the cold months, the eggs were cheaper to us than if we had to go on the market and buy them.

Q. Isn't it a fact you were securing a product in a handy form for your use which caused no trouble to you in the matter of mixing and which you were getting at a price that was far less than you could buy, on an average all year round?

A. On the all year round proposition, it was some less, but there were times we could go on the market and buy eggs for less than we paid for the Hipolite eggs.

Q. But not in the fall or winter months?

A. Oh, no.

Q. Do you recall what strictly fresh eggs did sell for in the city of Peoria in the months of January and February 1909?

A. No, I do not.

Recross-examination by Mr. LANNEN:

Q. Was the fact that those eggs were somewhat cheaper all the year round than eggs you could buy on the market, the only consideration which led you to buy those eggs?

A. I said they were not cheaper all the year round.

Q. I understood you to say that on the whole, they were cheaper than the eggs you could by on the market.

A. It was probably an average cheaper.

Q. I am asking you if that was the only consideration

52 which led you to purchase those eggs?

A. No.

Q. What were the other considerations?

A. We considered it was much cleaner and better to use for us than by breaking shell eggs, especially in the cold months when you didn't get fresh eggs.

Q. That was another consideration?

A. Yes.

Q. What was the chief consideration which led you to purchase those eggs?

A. That we could contract at a certain time when eggs were cheap and price guaranteed for practically our whole consumption of eggs for that season; didn't have to go to the market and buy them for 40 cents, or whatever the market price was, but could buy at a certain time enough for the whole season and feel sure they were sweet, clean and better fit for use than other eggs during parts of the season.

Q. All of those things entered into your reasons why you made this agreement?

A. They were easier to use in as much as we didn't have to break every egg and test every egg out before we put it in the vat.

Q. And you purchased them for that reason alone?

A. I think not.

The COURT: How is this material?

Q. I see on this receipt from the St. Louis Refrigerating and Cold Storage Company, the statement: "Received for shipment from Hipolite Egg Co., account of Thomas & Clarke Peoria, Illinois." Now I would like to ask you if you understand or know what that means?

A. I have an idea I know what it means. It means that the Hipolite Egg Co. was to deliver those eggs to the storage for our account as we had paid for them.

53 Q. But the St. Louis Refrigerating and Cold Storage Co. were not a transporting company were they?

A. No sir.

Q. What was their business?

A. Cold Storage.

Q. These eggs, as I understand, were delivered to this company for storage only?

A. That is the idea.

Q. How long did this particular 130 cans remain there in the cold storage plant?

A. Think from May until sometime in November.

Q. After having been placed there by the Hipolite Egg Co.?

A. Yes.

Mr. CONVERSE: I desire to offer Plaintiff's Exhibits 1, 2, 3 and 4 in evidence now.

Which said exhibits were admitted in evidence and are in words and figures as follows, towit—

"EXHIBIT 1."

No. 266. ST. LOUIS, Mo., *May 23rd*, 1908.

Thomas & Clarke, Peoria, Ill.,

Bought of Hipolite Egg Company,
7 South Second Street.

Mer. 123.
Phone:
Kinoch B–1038.

J. J. M.

Container.	Hipolite eggs, white.	Weight.	Price.	Amount.
	" " yolk			
370 cans.	" whole egg, #1...	15540	13½	2097.90
				terms contract
H. I. H.	Candled eggs. Paid.			

On contract.

54 "EXHIBIT 2."

Received for Shipment from Hipolite Egg Co.

H	R	P
A	1	
M	D	Y
5		21
		08

Lot No. 190

Acct. of Thomas & Clarke — W. H. R.

Address Peoria, Ill.

Sealed E W Car — page line

Rate 5c. can per month.

Rec'd.	No. of articles.	Description.	Weight.
Minimum charge on this lot 50c.	370	cans eggs 42#	15540
A storage month runs from date up to but not including date.		Transfer-ed under original number.	
		Storage paid to June 1st, '08.	
H. I. H.		St. Louis Refrigerating and Cold Storage Co.	
Any part is subject to charges on entire lot.			

R. D. to Hipolite.
C. F. Johnson.

R–15994

[Across face:] Not transferable.

(Endorsed on back thereof.)

		Exp. Bill.	Shipment Bill.
June	15/08—20 cans via boat.	Rec'd June	19/08.
June	26/08—20 " " "	" June	29/08.
July	9/08—20 " " "	" July	13/08.
July	22/08—20 " " "	" July	24/08.
Aug.	6, 1908—20 " " "	" Aug.	10/08.
Aug.	14, " —15 " " "	" Aug.	17/08.
Aug.	28, " —20 " " "	" Aug.	31/08.
Sept.	10, " —20 " " "	" Sept.	14/08.
"	25, " —20 " " "	" Sept.	29/08.

195 in storage.

Oct.	10/08— 5 " via Rail	Oct.	15/08.
"	10 " —20 " " Boat	Oct.	16/08.

170 in storage.

Nov. 2/08	20	Nov. 2, 1908.
Nov. 9/08	20	Nov. 13, 1908.
" 16/08	130	Nov. 20, 1908.

55 "EXHIBIT 3."

PEORIA, 11/20/1908.

Thomas and Clarke,

To Eagle Packet Co., Dr.

Str. Bald Eagle.

Marks.	For freight and charges as per bill of lading.	Weight.	Rate.	Freight.	Charges.	Amount.
130 cans egg syrup.....		5800	25	.....	.....	$14.50

J. J. M.

H. I. H.

Trip No. 87 B. L. No. —. Paid W. H. Martin.

"EXHIBIT 4."

No. 408. ST. LOUIS, MO., *Nov.* 16, 1908.

The Str. Bald Eagle
Received from Hipolite Egg Company,
7 South 2nd St., St. Louis, Mo.,
In good order, the following property for transportation to
Thomas & Clarke, Peoria, Ill.

Packages.	Articles.	Weight.
130 cans.	[Frozen eggs]* Egg syrup.	5800
[Cases.]*	[Eggs.]* J. J. M.	
[Barrels.]*	[Egg yolks.]*	

F. & D. Ex.

H. I. H. Original.

[Written across face:] Foster.

56 S. O. TRIPP, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Converse and testified as follows, to-wit:

Q. State your name?
A. S. O. Tripp.
Q. Your official position? ?
A. Deputy U. S. Marshal.
Q. Were you acting as Deputy U. S. Marshal for this district at the time of the seizure of certain cans of preserved whole egg that was made in this case?
A. Yes sir.
Q. Are you the officer who made the seizure?
A. Yes sir.
Q. I find in the files of the case the writ of monition and the return on the writ, and hand them to you. Is the return on that writ a return that you made?
A. Yes sir.
Q. Referring to the return you made on the writ, how many cans did you seize?
A. Fifty-two.
Q. At the time you seized these cans were they in an opened or sealed condition?
A. They were in sealed cans.
Q. Where have the cans been kept since the seizure?
A. In the temporary building of the post office department in this city until May 23rd and on that date they were removed to Thede Bros.' Warehouse on North Washington St.
Q. I also notice in the files of this case, there is a petition to deliver up one of these cans as a sample and an order of Court to deliver one

[* Words enclosed in brackets erased in copy.]

of these cans to Mr. S. H. Ross an analyst, of the Department of Agriculture; did you deliver such a can to Mr. Ross?

A. Yes sir.

Q. When was that?

A. On December 3, 1909.

Q. Where did you get this can that you delivered to Inspector Ross?

A. From the stock that was seized on the date of the seizure.

57 Q. Was this can that you delivered to Inspector Ross in the same condition as far as you are able to tell with reference to being opened or sealed or unsealed, at the time of the seizure?

A. It was sealed at the time of the seizure and was in the same condition when given to Mr. Ross.

Q. Did Mr. Ross take it away from the ctiy of Peoria with him?

A. Yes sir.

Cros-examination by Mr. LENNAN:

Q. You say you gave Mr. Ross one of these cans?

A. Yes sir, I delivered one can to him.

Q. Was that the same kind of can as all the rest of them?

A. Yes sir, same size, same kind.

Q. Weighed about fifty pounds and held about the same quantity of goods?

A. Yes sir.

Q. Did you pay Thomas and Clarke anything for that can of eggs?

A. No sir.

Q. Did anybody pay Thomas and Clarke anything for that can of eggs?

A. No sir.

Q. Not that you know of?

A. Nothing paid on that can by any one.

Q. Has Thomas and Clarke had possession of those eggs at any time since you seized them?

A. No sir.

Q. They have been under your custody and control all this time?

A. Yes sir.

Which was all the evidence offered or admitted upon the question of the purchase of said eggs by Thomas & Clarke and the ownership of said eggs and the shipment of said eggs from St. Louis, Missouri, to Peoria, Illinois and the use to which said eggs were to be put and the disposition to be made of same after shipment from St. Louis, Missouri, to Peoria, Illinois.

58 Thereupon counsel for claimant then and there moved the Court to dismiss said libel on the ground that it appeared from the evidence that this Court has no jurisdiction as a Federal Court to proceed against the eggs in question, because it appears that said eggs were not shipped for sale within the meaning of Section 10 of the Act of June 30, 1906, under which section and law this proceeding is brought, and *and* for the further reason that such eggs had passed out of interstate commerce and beyond the jurisdiction of this

Court at the time of seizure, in that the said eggs were in the storeroom of the said Thomas & Clarke and were not intended for sale by them in the original unbroken packages or otherwise, and were mixed and intermingled with their baking supplies and consequently were no longer the subject of interstate commerce.

But the Court overruled said motion, to which ruling of the Court claimant by its counsel then and there duly excepted.

And thereupon the trial of said cause proceeded and evidence was offered and admitted for both the libellant and the claimant on the question of whether or not said eggs were adulterated as charged in the libel and information in this cause.

And again at the close of all the evidence in this case counsel for claimant renewed his said motion for claimant that the Court dismiss the libel and information of said libellant on the ground that this Court has no jurisdiction as a Federal Court to proceed against the eggs in question because it appears from the evidence that said eggs were the property of Thomas & Clarke while in storage at St. Louis, Missouri, and that said shipment from St. Louis to Peoria, Illinois,
was a shipment by Thomas & Clarke of its own property to
59 itself from St. Louis to Peoria for manufacturing purposes
and not for sale within the meaning of Section 10 of the Food & Drugs Act of June 30, 1906, authorizing the seizure of adulterated or misbranded foods or drugs shipped in interstate commerce for sale and under which section and law this proceeding is brought; and for the further reason that this Court is without jurisdiction as a Federal Court to proceed against the eggs in question because it appears from the evidence that at the time of the seizure of said eggs by the Marshal said eggs had passed out of interstate commerce and were stored in the storeroom of Thomas & Clarke in Peoria and were mixed and intermingled with the bakery supplies of Thomas & Clarke and then and there in common with all said supplies intended only for manufacturing purposes and not intended for sale in the original unbroken packages or otherwise, and a large portion of said shipment of eggs had actually been used for manufacturing purposes.

But the Court overruled said motion, to which ruling of the Court claimant by its counsel then and there duly excepted.

Now on this come again the parties hereto by their respective attorneys and this cause now being submitted to the Court upon the pleadings and proof adduced the Court finds the facts in this cause as follows:

Special Finding of Facts.

The Court finds the facts to be:

1. This libel is filed by the United States of America in its own right and prays seizure for condemnation of certain articles of food contained in fifty cans, more or less, purported and represented to
be "Preserved Whole Egg" as hereinafter particularly set
60 forth, in accordance with the Act of Congress approved June
30, 1906, and more commonly known as The Food and Drugs Act. This proceeding is brought under section 10 of said act.

The Court finds that on or about May 14th, 1908, Thomas & e, an Illinois corporation, with its place of business in the City oria in this District and engaged in the business of conducting alled crackers bakery in said city entered into a written con- with the Hipolite Egg Company, a Missouri corporation, business in St. Louis, Missouri; by the terms of which con- the Hipolite Egg Company was to put up and preserve a cer- quantity of preserved whole egg.

The said contract entered into as aforesaid between Thomas & e and Hipolite Egg Company was then and there in words and s as follows, to wit:

"Thomas & Clarke,
306-9-10-12 South Washington St.

PEORIA, ILL., *May* 14, '08.

. Thomas & Clarke, Peoria, Illinois.

NTLEMEN: We hereby agree to sell to you 400 cans of Hipolite e Egg at 13½ cents per pound, net, F. O. B. St. Louis, Mo. to be delivered to the St. Louis Refrigerating and Cold Stor- ompany and paid for on delivery of Cold Storage Company's ts to Thomas and Clarke. Each can to contain 42 pounds nd quality guaranteed; also guaranteed under Pure Food Laws inois and Missouri. We also agree to take same from said Storage Company on your order as wanted, making ship- ments to you as required, without charge for drayage; max- imum storage not to exceed five cents per can per month.

Yours very truly,

HIPOLITE EGG CO.,
Per W. H. HIPOLITE.

epted as contract by Thomas & Clarke this 14th day of May

THOMAS & CLARKE.
Per H. I. HARDIN."

Under the terms of this contract the Hipolite Egg Company ed the eggs in question in this suit and on or about the 21st May, 1908, placed said eggs in a cold storage warehouse at nis, Missouri, in the name of Thomas & Clarke, and a ware- receipt covering said eggs was issued to Thomas & Clarke and ded to them by the Hipolite Egg Company, together with an e for the contract price of said eggs. Thereafter, on or about lst, 1908, Thomas & Clarke paid said invoice to the Hipolite ompany.

n the early part of November, 1908, Thomas & Clarke sent a n order on the warehouse where said eggs were stored to the te Egg Company for the eggs in question to be delivered to te Egg Company for shipment to Thomas & Clarke. Hipo- g Company thereupon presented said order to the warehouse

and obtained said eggs and delivered same to a common carrier for shipment to Thomas & Clarke, at Peoria, Illinois.

6. Thomas & Clarke paid all storage charges on said eggs while in storage at St. Louis as aforesaid. Thomas & Clarke also took out insurance in its own name on said eggs while in storage at St.
62 Louis as aforesaid, and paid all premiums thereon. Thomas & Clarke also paid the freight on said eggs from St. Louis to Peoria. Hippolite Egg Company received no extra compensation for taking said eggs from the warehouse and delivering same to the common carrier.

7. The Court finds that said eggs were transported from St. Louis, State of Missouri, to Peoria, in the State of Illinois, as aforesaid and were received by Thomas & Clarke at Peoria on or about November 16th, 1908.

8. The said shipment consisted of one hundred and thirty cans each can containing about forty-two pounds of eggs. Each can was a separate sealed package. The eggs in the cans were whole eggs, minus the shells, that had been broken out of the shells into these cans.

9. The Court finds that the said eggs were an article of food and contained added to it a deleterious ingredient known as boric acid which may render such article injurious to health, and that the said eggs were in fact injurious to health. And the Court further finds that the amount of boric acid contained in said eggs was approximately two per cent. and the Court finds that said eggs were adulterated within the meaning of the Act of June 30, 1906.

10. Thomas & Clarke did not know at the time of shipment that said eggs contained boric acid. At the time of making said contract Thomas & Clarke did not know by what process Hipolite Egg Company would preserve said eggs, but did know that the eggs were to be preserved by having added thereto some kind of a preservative in addition to being sealed in air tight cans.

11. At the time of the seizure of said eggs they were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria, along with their bakery supplies.
63 About 80 cans of said shipment had been used by opening said cans and pouring said eggs into a mixture of flour and other ingredients and thereby making a dough. This dough was baked into pastry, such as vanilla wafers, and this pastry was sold to the public. The fifty cans more or less, seized by the Marshal were intended and about to be used for baking purposes as aforesaid at the time of seizure, and said eggs were not intended to be sold as eggs in the original unbroken packages, or otherwise, but were to be used only as above set forth and were transported as aforesaid only for such purpose, but at the time of seizure said eggs were in unbroken, original packages, as originally shipped, and were then on the premises of Thomas & Clarke unsold.

12. Thomas & Clarke sold one original package of said egg to Inspector McManus, the contents of which was analyzed by the Department of Agriculture and found to contain Boric Acid, and the seizure in this case was made upon the report of said analysis.

To which action of the Court in entering such findings counsel for claimant then and there duly excepted on the ground that it appears from the evidence that this Court is without jurisdiction as a Federal Court to proceed against said eggs or make the aforesaid findings.

Thereupon the Court entered a decree confiscating said eggs to the libelant, and assessing the costs of this proceeding against the claimant, Hipoilte Egg Company, and directing that execution issue therefor.

To which action of the Court in making and entering said decree claimant by its counsel then and there duly excepted on the ground that it appeared from the evidence that this Court as a Federal Court has no jurisdiction to make or enter said decree or condemn and confiscate said eggs; and for the further reason that this
64 Court as a Federal Court has no jurisdiction over the claimant, Hipolite Egg Company, in personam and is therefore without jurisdiction to enter a personal judgment against said Hipolite Egg Company for the costs in this proceeding.

And forasmuch as the matters above set forth do not fully appear of record, the claimant, Hipolite Egg Company, by its counsel, tenders this its bill of exceptions and prays that the same may be signed and sealed and made a part of the record herein pursuant to the statute in such case made and provided; which is accordingly done this 11th day of February, A. D. 1910.

(Signed) HUMPHREY, *Judge.* [SEAL.]

Endorsed: United States District Court, Southern District of Illinois, Northern Division. No. 211. In Rem—United States of America vs. Fifty cans, more or less, of preserved whole egg. Bill of Exceptions. Filed Feb. 11, 1910. R. C. Brown, Clerk. Law offices of Lannen & Hickey, 1027 First National Bank Bld'g, Chicago, Illinois.

And afterwards, to-wit, on the same day the following further proceedings were had in said Court in said cause and were entered of record as follows:

65 *Order Allowing Writ of Error.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the District Court of the United States in and for said District.

No. 211.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Order Allowing Writ of Error.

It appearing to the Court that Hipolite Egg Company, by its attorney, has filed its assignment of errors and petition for a writ of error from the Supreme Court of the United States to review the decree entered herein December 20th, 1909, confiscating said fifty cans, more or less, of preserved whole egg, and assessing the costs of said proceeding against the said Hipolite Egg Company.

It is therefore ordered that said writ of error be allowed upon the sole question of the jurisdiction of said District Court to make and enter such decree as aforesaid, upon said plaintiff in error filing its writ of error bond herein in the penal sum of two hundred dollars within twenty days from this date, and the approval of said bond by this Court.

HUMPHREY, *Judge.* [SEAL.]

Endorsed: United States District Court, Southern District of Illinois, Northern Division. No. 211. In Rem—United States of America vs. Fifty cans more or less of preserved whole egg. Order allowing writ of error. Filed Feb. 11, 1910. R. C. Brown, Clerk.

66 And afterwards, to-wit, on the 26th day of February, A. D. 1910, there was filed in said Clerk's office, the Bond on Writ of Error, which is as follows:

Bond on Writ of Error.

Filed Feb. 11, 1910.

Know all men by these presents, that we, Hipolite Egg Company, a corporation, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Dollars ($200.00) to be paid to the said United States of America: To which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of February in the year of our Lord, 1910.

Whereas, lately at a term of the District Court of The United States for the Southern District of Illinois, Northern Division, in a suit depending in said Court between the United States of America, Libelant, and Fifty Cans, more or less, of Preserved Whole Egg, in which said suit said Hipolite Egg Company appeared as claimant, a decree was rendered against said claimant, Hipolite Egg Company, and said claimant, Hipolite Egg Company having obtained a writ of error from the Supreme Court of the United States to reverse the decree in the aforesaid suit on the sole question of jurisdiction.

Now, the conditions of the above obligation is such that if the said claimant, Hipolite Egg Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

67 [SEAL.] HIPOLITE EGG CO.,
By W. H. HIPOLITE, *President.*
FIDELITY AND DEPOSIT CO. OF MD.,
By J— HUMPHREY, *Resident Vice-President.*

Attest:

JOHN S. BATES, [SEAL.]
Resident Ass't Secretary.

O. K.
HUMPHREY, *J.*

STATE OF MISSOURI,
Eastern District of Missouri, City of St. Louis, ss:

I, Florence Paillou, a Notary Public, within and for the City of St. Louis, and State of Missouri, do hereby certify that on this 17th day of February, A. D. 1910, personally came before me W. H. Hipolite, personally known to me to be the President of the Hipolite Egg Company, a corporation, and said W. H. Hipolite acknowledged that he, as President of said Hipolite Egg Company, executed the foregoing bond as the free and voluntary act of said Hipolite Egg Company, a corporation.

In witness whereof I have hereunto set my hand and official seal at said County, on the day and year first above written.

FLORENCE PAILLOU,
[SEAL.] *Notary Public.*

My term expires April 19, 1911.

Endorsed: Filed Feb. 26, 1910. R. C. Brown, Clerk.

68 On the 11th day of February, A. D. 1910, there was also filed in the Clerk's office of said Court, the Certificate of Jurisdictional Questions, which said Certificate is signed by the Judge of said Court and is as follows:

Certificate of Jurisdictional Questions.

Filed Feb. 11, 1910.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the District Court of the United States in and for said District.

No. 211.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG, HIPOLITE EGG COMPANY, Claimant.

Certificate of Jurisdictional Questions.

The District Court of the United States for the Southern District of Illinois hereby certifies to the Supreme Court of the United States that on the 20th day of December, A. D. 1909, a decree was entered in the above entitled cause confiscating said fifty cans more or less of preserved whole eggs and assessing the costs of said case against Hipolite Egg Company, claimant in the above entitled cause.

And this Court further certifies that in said cause the jurisdiction of this Court is in issue; and that said question of jurisdiction was raised in the following manner:

1st. The libel in this case was a proceeding in rem under Section 10 of the Act of June 30, 1906, (34 Statutes at Large, 771), against fifty cans more or less of Preserved Whole Egg, the libel
69 alleging that said eggs were transported in interstate commerce from St. Louis, Missouri, to Peoria, Illinois, and were adulterated within the meaning of said Act.

2nd. It appeared from the evidence on the part of the libellant on the trial of this cause that said eggs before the shipment alleged in the libel had been stored in a warehouse in St. Louis, Missouri, for about five months, during all of which time the said eggs were the property of and owned by Thomas & Clarke, an Illinois corporation engaged in the bakery business at Peoria, Illinois, in this District.

3rd. On or about November first, 1909, Thomas & Clarke procured the shipment of these eggs from St. Louis, Missouri, to themselves at Peoria, Illinois; and upon receipt of said eggs Thomas & Clarke placed the shipment in their storeroom in their bakery factory at Peoria along with their other bakery supplies.

4th. These eggs were intended for use by Thomas & Clarke for baking purposes, and were not intended for sale by them in the original unbroken packages or otherwise, and were not so sold.

5th. Hipolite Egg Company, a corporation of Missouri, appeared as claimant of said eggs and intervened and filed an answer to said

libel and defended this case, but did not enter into any stipulation to pay the costs of this case.

6th. Upon the close of Libellant's evidence and again at the close of all the evidence counsel for claimant moved the Court to dismiss said libel on the ground that it appeared from the evidence that this Court as a Federal Court had no jurisdiction to proceed
70 against or confiscate said eggs, because said eggs were not shipped in interstate commerce for sale within the meaning of Section 10 of said Food & Drugs Act, and for the further reason that the evidence showed that said shipment of eggs had passed out of interstate commerce before the seizure of said eggs in this case, because it appeared that said eggs had been delivered to Thomas & Clarke and were not intended to be sold by them in the original unbroken packages or otherwise.

7th. This Court overruled said motions, to which rulings counsel for claimant then and there duly excepted, and this Court then proceeded to hear and determine said cause and entered a decree finding said eggs adulterated and confiscating the same and assessing the costs of this case against the claimant, Hipolite Egg Company.

8th. Counsel for claimant excepted to the rendition and entry of said decree on the ground that this Court is without jurisdiction in rem over the subject matter and on the further ground that this Court is without jurisdiction to enter a judgment in personam against said claimant Hipolite Egg Company for costs of said case as aforesaid.

And this Court therefore certifies to the Supreme Court of the United States the following questions of jurisdiction raised as aforesaid:

First. The question of whether this Court had jurisdiction in rem over said eggs transported as aforesaid.

Second. The question of whether this Court had jurisdiction to render and enter a decree for costs against the claimant, Hipolite Egg Company, in personam.

Dated this 11th day of Feb'y, A. D. 1910.

(Signed) HUMPHREY, *Judge*. [SEAL.]

Endorsed: Filed Feb. 11, 1910. R. C. Brown, Clerk.

71 On the 11th day of February, A. D. 1910, came Thos. E. Lannen, attorney for claimant, Hipolite Egg Company, and filed its Petition for Appeal and said petition is as follows:

Petition for Appeal.

Filed Feb. 11, 1910.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the District Court of the United States in and for Said District.

No. 211.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Petition for Appeal.

To the Honorable J. Otis Humphrey, Judge of said Court:

Comes now the above named claimant, Hipolite Egg Company, by Thomas E. Lannen, its attorney, and conceiving itself to be aggrieved by the decree made and entered in the above entitled cause on the 20th day of December, A. D. 1909, wherein and whereby it was ordered that said fifty cans, more or less, of preserved whole egg be confiscated to the United States of America, and that the costs in the above entitled cause be assesses against said claimant, Hipolite Egg Company, hereby petitions said Court for an order allowing said claimant to prosecute an appeal from said decree to the Honorable Supreme Court of the United States on the single
72 question of the jurisdiction of this Court to make and enter said decree.

And your petitioner, Hipolite Egg Company, files herewith its assignment of errors in this behalf.

THOMAS E. LANNEN,
Attorney for Hipolite Egg Company, Claimant.

Endorsed: United States District Court, Southern District of Illinois, Northern Division. No. 211, In Rem. United States of America vs. Fifty cans, more or less, of preserved whole egg. Petition for Appeal. Filed Feb. 11, 1910. R. C. Brown, Clerk. Law offices of Lannen & Hicket, 1027 First National Bank Bldg., Chicago, Illinois.

And afterwards, to-wit, on the same day the following further proceedings were had in said court in said cause and were entered of record as follows,—

73 *Order Allowing Appeal.*

Entered Feb. 11, 1910.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the District Court of the United States in and for Said District.

No. 211.

UNITED STATES OF AMERICA, Libellant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Order Allowing Appeal.

It appearing to the Court that Hipolite Egg Company claimant in the above entitled cause, has filed herein a petition for appeal and assignment of errors, praying an appeal to the Supreme Court of the United States on the sole question of the jurisdiction of this Court to make and enter the decree heretofore made and entered herein confiscating said fifty cans, more or less, of preserved whole egg, and assessing the costs of said proceeding against said claimant.

It is therefore ordered that said appeal be and the same is hereby allowed upon the sole question of the jurisdiction of said District Court to make and enter said decree as aforesaid, upon said appellant filing its appeal bond herein in the penal sum of two hundred dollars within twenty days from this date, and the approval of said bond by this Court.

(Signed) HUMPHREY, *Judge.* [SEAL.]

Endorsed: United States District Court, Southern District of Illinois, Northern Division. No. 211, In Rem. United States of America vs. Fifty cans, more or less, of preserved whole egg. Order allowing Appeal. Filed Feb. 11, 1910. R. C. Brown, Clerk. Law offices of Lannen & Hickey, 1027 First National Bank B'ld'g, Chicago, Illinois.

74 And afterwards, to-wit, on the 26th day of February, A. D. 1910, there was filed in the office of the Clerk of said Court the Bond on Appeal and said bond is as follows;—

Bond on Appeal.

Filed Feb. 26, 1910.

Know all men by these presents, That we, Hipolite Egg Company, a corporation, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the United

States of America in the full and just sum of Two Hundred Dollars ($200.00) to be paid to the said United States of America; To which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of February in the year of our Lord, 1910.

Whereas, lately at a term of the District Court of the United States for the Southern District of Illinois, Northern Division, in a suit depending in said Court between the United States of America, Libelant, and Fifty Cans, more or less, of Preserved Whole Egg, in which said suit said Hipolite Egg Company appeared as claimant, a decree was rendered against said claimant, Hipolite Egg Company, and said claimant, Hipolite Egg Company having obtained an appeal from said Court to the Supreme Court of the United States to reverse the decree in the aforesaid suit on the sole question of jurisdiction.

Now, the conditions of the above obligation is such, that if the said claimant, Hipolite Egg Company, shall prosecute its
75 appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

HIPOLITE EGG CO,
[SEAL.] By W. H. HIPOLITE, *President.*
FIDELITY AND DEPOSIT CO. OF MD.,
By J. — HUMPHREY,
Resident Vice-President.

Attest:
JOHN S. BATES, [SEAL.]
Resident Ass't Secretary.

O. K.
HUMPHREY, *J.*

STATE OF MISSOURI,
Eastern District of Missouri, City of St. Louis, ss:

I, Florence Paillou, a Notary Public within and for the City of St. Louis, and State of Missouri, do hereby certify that on this 17th day of February, A. D. 1910, personally came before me W. H. Hipolite, personally known to me to be the president of the Hipolite Egg Company, a corporation, and said H. W. Hipolite acknowledged that he, as President of said Hipolite Egg Company, executed the foregoing bond as the free and voluntary act of said Hipolite Egg Company, a corporation.

In witness whereof I have hereunto set my hand and official seal at said City on the day and year first above written.

[SEAL.] FLORENCE PAILLOU,
Notary Public.

My term expires April 19, 1911.

Endorsed: Filed Feb. 26, 1910. R. C. Brown, Clerk.

76 And on the 11th day of February, A. D. 1910, there was filed in said Clerk's Office, the Special Finding of Facts, which is as follows; towit;—

Special Finding of Facts.

Filed Feb. 11, 1910.

In the District Court of the United States, Southern District of Illinois, Northern Division.

No. 211. In Rem.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Special Finding of Facts.

Now on this day come again the parties hereto by their respective attorneys and this cause now being submitted to the Court upon the pleadings and proof adduced the Court finds the facts in this cause as follows;

Special Finding of Facts.

The Court finds the facts to be;

1. This libel is filed by the United States of America in its own right and prays seizure for condemnation of certain articles of food contained in fifty cans, more or less, purported and represented to be "Preserved Whole Egg" as hereinafter particularly set
77 forth, in accordance with the Act of Congress approved June 30, 1906, and more commonly known as The Food and Drugs Act. This proceeding is brought under section 10 of said act.

2. The Court finds that on or about May 14th, 1908, Thomas & Clarke, an Illinois corporation, with its place of business in the City of Peoria in this District and engaged in the business of conducting a so-called crackers bakery in said city entered into a written contract with the Hipolite Egg Company, a Missouri corporation, doing business in St. Louis, Missouri; by the terms of which contract the Hipolite Egg Company was to put up and preserve a certain quantity of preserved whole egg.

3. The said contract entered into as aforesaid between Thomas & Clarke and Hipolite Egg Company was then and there in words and figures as follows, to-wit:

"Thomas & Clarke,
306-9-10-12 South Washington St.

PEORIA, ILL., *May* 14, '08.

Messrs. Thomas & Clarke, Peoria, Illinois.

GENTLEMEN: We hereby agree to sell to you 400 cans of Hipolite Whole Egg at 13½ cents per pound, net, F. O. B. St. Louis,

Mo. These to be delivered to the St. Louis Refrigerating and Cold Storage Company and paid for on delivery of Cold Storage Company's receipts to Thomas and Clarke. Each can to contain 42 pounds net, and quality guaranteed; also guaranteed under Pure Food Laws of Illinois and Missouri. We also agree to take
78 same from said Storage Company on your order as wanted, making shipments to you as required, without charge for drayage; maximum storage not to exceed five cents per can per month.

Yours very truly,

HIPOLITE EGG CO.,
Per W. H. HIPOLITE.

Accepted as contract by Thomas & Clarke this 14th day of May, 1908.

THOMAS & CLARKE,
Per H. I. HARDIN."

4. Under the terms of this contract the Hipolite Egg Company prepared the eggs in question in this suit and on or about the 21st day of May, 1908, placed said eggs in a cold storage warehouse at St. Louis, Missouri, in the name of Thomas & Clarke, and a warehouse receipt covering said eggs was issued to Thomas & Clarke and forwarded to them by the Hipolite Egg Company, together with an invoice for the contract price of said eggs. Thereafter, on or about June 1st, 1908, Thomas & Clarke paid said invoice to the Hipolite Egg Company.

5. In the early part of November, 1908, Thomas & Clarke sent a written order on the warehouse where said eggs were stored to the Hipolite Egg Company for the eggs in question to be delivered to Hipolite Egg Company for shipment to Thomas & Clarke. Hipolite Egg Company thereupon presented said order to the warehouse and obtained said eggs and delivered same to a common carrier for shipment to Thomas & Clarke, at Peoria, Illinois.

6. Thomas & Clarke paid all storage charges on said eggs while in storage at St. Louis as aforesaid. Thomas & Clarke also took out insurance in its own name on said eggs while in storage
79 at St. Louis as aforesaid, and paid all premiums thereon. Thomas & Clarke also paid the freight on said eggs from St. Louis to Peoria. Hipolite Egg Company received no extra compensation for taking said eggs from the warehouse and delivering same to the common carrier.

7. The Court finds that said eggs were transported from St. Louis, State of Missouri, to Peoria, in the State of Illinois, as aforesaid and were received by Thomas & Clarke at Peoria on or about November 16th, 1908.

8. The said shipment consisted of one hundred and thirty cans each can containing about forty-two pounds of eggs. Each can was a separate sealed package. The eggs in the cans were whole eggs, minus the shells, that had been broken out of the shells into these cans.

9. The Court finds that the said eggs were an article of food and contained added to it a deleterious ingredient known as boric acid which may render such article injurious to health, and that the said eggs were in fact injurious to health. And the Court further finds that the amount of boric acid contained in said eggs was approximately two per cent. and the Court finds that said eggs were adulterated within the meaning of the Act of June 30, 1906.

10. Thomas & Clarke did not know at the time of shipment that said eggs contained boric acid. At the time of making said contract Thomas & Clarke did not know by what process Hipolite Egg Company would preserve said eggs, but did know that the eggs were to be preserved by having added thereto some kind of a preservative in addition to being sealed in air tight cans.

11. At the time of the seizure of said eggs they were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria, along with their bakery supplies. About 80 cans of said
80 shipment had been used by opening said cans and pouring said eggs into a mixture of flour and other ingredients and thereby making a dough. This dough was baked into pastry, such as vanilla wafers, and this pastry was sold to the public. The fifty cans more or less, seized by the Marshal were intended and about to be used for baking purposes as aforesaid at the time of seizure, and said eggs were not intended to be sold as eggs in the original unbroken packages, or otherwise, but were to be used only as above set forth and were transported as aforesaid only for such purpose, but at the time of seizure said eggs were in unbroken, original packages, as originally shipped, and were then on the premises of Thomas & Clarke unsold.

12. Thomas & Clarke sold one original package of said egg to Inspector McManus, the contents of which was analyzed by the Department of Agriculture and found to contain Boric Acid, and the seizure in this case was made upon the report of said analysis.

(Signed) HUMPHREY, *Judge.* [SEAL.]

Endorsed: United States District Court, Southern District of Illinois, Northern Division. No. 211. In rem. United States of America vs. Fifty cans, more or less, of preserved whole egg. Special Finding of Facts. Filed Feb. 11, 1910. R. C. Brown, Clerk. Law offices of Lannen & Hickey, 1027 First National Bank Building, Chicago, Illinois.

81 *Præcipe for Record.*

Filed Feb. 11, 1910.

In the District Court of the United States, Southern District of Illinois, Northern Division.

No. 211.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

Præcipe for Transcript.

To the Clerk of the above entitled court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Supreme Court under the writ of error allowed by said Court and under the appeal allowed by the District Court of the United States for the said transcript the following pleadings, proceedings and papers on file, towit:

Præcipe for Record.

Libel and Information and amendment thereto, Monition, with the return of the marshal thereon.

Order entered December 9, 1909, granting leave to Thomas & Clarke to appear specially for certain purposes,

Special appearance of Thomas & Clarke, filed December 9th, 1909, waiving ownership of said eggs in favor of Hipolite Egg Company, etc., and affidavit of H. I. Hardin attached thereto,

Answer of Hipolite Egg Company to the libel as amended, filed December 9, 1909, and the affidavit of Thomas E. Lannen attached thereto,

Stipulation waiving jury.

Decree entered December 20th, 1909.

82 Bill of Exceptions,

Special finding of facts,

Assignment of Errors,

Order extending time to appeal,

Petition for Writ of Error,

Order Allowing Writ of Error,

Bond of Hipolite Egg Company in the matter of Writ of Error from U. S. Supreme Court,

Petition for Appeal,

Order allowing Appeal,

Bond of Hipolite Egg Company in the matter of appeal to U. S. Supreme Court,

Certificate of Jurisdictional Questions,

Clerk's certificate,

Said transcript to be prepared as required by law and the Rules of this Court and the Rules of the United States Supreme Court.

THOMAS E. LANNEN,
Attorney for Hipolite Egg Company.

Endorsed: No. 211. U. S. District Court, Southern District of Illinois, Northern Division. United States of America vs. Fifty cans, more or less, of Preserved Whole Egg. Præcipe. Filed Feb. 11, 1910. R. C. Brown, Clerk. Law offices of Lannen & Hickey, 1027 First National Bank Building, Chicago.

83 And afterwards, to-wit, on the 10th day of March, A. D. 1910, the following further proceedings were had in said Court in said Cause and were entered of record, to-wit:

Order Extending Time for Filing Appeal Record.

Entered M'ch 10, 1910.

In the District Court of the United States, Southern District of Illinois, Northern Division.

UNITED STATES OF AMERICA, Libelant,
vs.
FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGG.

For good cause shown, the time for filing the record in the above entitled cause in the office of the Clerk of the Supreme Court upon the Appeal and Writ of Error of Hipolite Egg Company is hereby extended to and including the 7th day of May, A. D. 1910.

HUMPHREY, *J.*

Endorsed: Order extending time to file record. Filed Mar. 10, 1910. R. C. Brown, Clerk.

84 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Southern District of Illinois, Northern Division, ss:

I, R. C. Brown, Clerk of the District Court of the United States for the Southern District of Illinois do hereby certify the foregoing is a true and complete copy of all papers filed and proceedings thereon had as required by the præcipe filed in the cause of the United States of America, Libelant, vs. Fifty cans, more or less, of Preserved Whole Egg, Hipolite Egg Company, a corporation, Claimant, as the same appear of file and record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Peoria, in said Division and District, this

18th day of March, in the year of our Lord one thousand nine hundred and ten and of our Independence the one hundred and thirty-fourth year.

[Seal of the District Court United States, Southern District Illinois, Northern Division.]

R. C. BROWN, *Clerk,*
By J. T. B. JONES,
Chief Deputy Clerk.

85 UNITED STATES OF AMERICA,
Southern District of Illinois, Northern Division, ss:

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said District Court, between United States of America, Libelant, and Fifty cans, more or less, of Preserved Whole Egg, Hipolite Egg Company, Claimant, in an action In Rem a manifest error hath happened, to the great damage of the said Hipolite Egg Company, Claimant, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 7th day of May, A. D. 1910, in the said Supreme Court of the United States, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 18th day of March in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the 134th year.

[Seal of the District Court United States, Southern District Illinois, Northern Division.]

R. C. BROWN,
Clerk District Court, United States,
Southern District Illinois.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a true and correct copy of the record and all proceedings in the within entitled case.

As witness my hand and official seal this 18th day of March A. D., 1910.

R. C. BROWN,
Clerk United States District Court,
Southern District of Illinois.

[Endorsed:] United States Supreme Court. United States of America, Libelant, vs. Fifty cans, more or less, of Preserved Whole Egg, Hipolite Egg Company, Claimant. Writ of error. Copy deposited for the defendant in Error in the Clerk's Office, United States, Southern District of Illinois.

86 UNITED STATES OF AMERICA, *ss:*

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Northern Division, wherein Hipolite Egg Company is claimant. and you are Libelant, to show cause, if any there be, why the Decree rendered against the said Claimant as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of March, in the year of our Lord one thousand nine hundred and ten.

J. O. HUMPHREY,
United States District Judge for the
Southern District of Illinois.

Service of the above citation and receipt of copy thereof admitted this 7th day of March A. D., 1910.

W. A. NORTHCOTT,
Attorney for United States of America, Libelant.

87 UNITED STATES OF AMERICA, *ss:*

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an Appeal, filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Northern Division, wherein Hipolite Egg Company is claimant and you are Libelant, to show cause, if any there be, why the Decree rendered against the said claimant as in the said Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 7th day of March, in the year of our Lord one thousand nine hundred and ten.

J. O. HUMPHREY,
United States District Judge for the Southern District of Illinois.

Service of the above citation and receipt of copy thereof admitted this 7th day of March A. D., 1910.

W. A. NORTHCOTT,
Attorney for United States of America, Libelant.

Endorsed on cover. File No. 22,125. S. Illinois D. C. U. S. Term No. 519. Hipolite Egg Company, claimant of fifty cans, more or less, of preserved whole egg, plaintiff in error and appellant, vs. The United States. Filed April 26th, 1910. File No. 22,125.

Office Supreme Court U. S.
FILED
MAY 10 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM 1909.

HIPOLITE EGG COMPANY, Claimant of fifty cans, more or less, of Preserved whole Egg,

Plaintiff in Error and Appellant,

vs.

THE UNITED STATES.

No. 519

Motion to Advance.

Now comes the Hipolite Egg Company, plaintiff in error and appellant, by Thomas E. Lannen, its attorney, and moves this Honorable Court to advance this cause on the calendar and submit the same on briefs under the rule. And said plaintiff in error and appellant respectfully shows to the Court the following:

This cause came into this honorable Court on an appeal, and also on a writ of error, from the United States District Court for the southern district of Illinois, Northern Division, on a question of the jurisdiction of said Court as a Federal Court.

The facts in this cause are as follows:

Thomas & Clarke, a corporation at Peoria, Illinois, and engaged in the bakery business at that city, purchased some preserved whole eggs, being eggs broken out of their shells into five gallon cans and preserved with boric acid, from Hipolite Egg Company of St. Louis, Mo. Hipolite Egg Company placed said eggs in a warehouse in St. Louis, Mo., in the name of Thomas & Clarke, and said eggs remained in said warehouse several months as the property of Thomas & Clarke.

In the Fall of 1909, Thomas & Clarke caused one hundred and thirty five-gallon cans of these eggs to be shipped to itself at Peoria to be used for manufacturing purposes, to-wit, for making pastry goods such as vanilla wafers, etc., by mixing said eggs with flour and other ingredients. The value of the eggs in this shipment was about $650.00. These one hundred and thirty cans were placed in the supply room of Thomas & Clarke in Peoria and about eighty cans were used for manufacturing purposes as aforesaid.

Then the United States filed a libel for condemnation against the remaining fifty cans of said eggs under section 10 of the Food and Drugs Act of June 30, 1906, 34 Statutes at Large, 771, the charge being that the eggs were adulterated with boric acid. The value of these fifty cans was about $250.00.

Thomas & Clarke by leave of Court appeared specially and waived all right, title and interest in said eggs in favor of Hipolite Egg Company, who sold the eggs to Thomas & Clarke. Hipolite Egg Company intervened and filed its claim to said eggs and filed its answer, but did not stipulate to pay costs.

The case was tried by the Court without a jury, a jury

being waived. The issues were found in favor of the United States, and a decree entered on December 20, 1909, confiscating said eggs and ordering the marshal to destroy them within thirty days, which order was duly executed.

The honorable trial Judge also assessed the costs of the proceeding against Hipolite Egg Company, claimant.

The honorable trial Judge duly certifies to this Honorable Court the following questions of jurisdiction:

The question of the jurisdiction of a Federal Court to proceed *in rem* against said eggs, which involves the question of whether or not said eggs could be proceeded against by a Federal Court under section 10 of said Act, and whether or not said eggs had passed out of Interstate Commerce and beyond the jurisdiction of a Federal Court at the time of seizure; and,

The question of the jurisdiction of said Court as a Federal Court to assess the costs of said case against Hipolite Egg Company, appellant and plaintiff in error, *in personam.*

We believe this Honorable Court should advance this cause for an early consideration because it involves the right of appellant and plaintiff in error to its property seized and confiscated by the United States; and for the further reason that this case is the first case in this Honorable Court that involves the question of the jurisdiction of a Federal Court under the National Food Law, and the extent to which the National Food Law applies to an article of food after it has been shipped into a State, that is to say, how far the United States may follow an article of food after shipment and delivery to the consignee and seize and confiscate that food. This is of vital importance to

the United States and the several States, as a decision of this point will determine the right of the Government to seize food in a State under the National Food Law, and the right of a State to seize such food under a State Food Law. This point is undecided since the passage of the National Food Law, and a decision on it is very desirable for both sides, and will facilitate the operation of the National Food Law, and we trust this Honorable Court will advance it for an early consideration and decision.

THOMAS E. LANNEN,
Attorney for Plaintiff in Error and Appellant.

EDWARD T. FENWICK,
of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

HIPOLITE EGG COMPANY, CLAIMANT OF fifty cans, more or less, of Preserved Whole Egg, Plaintiff in error and appellant,
v.
THE UNITED STATES.
} No. 899.

REPLY TO MOTION TO ADVANCE.

The United States concedes that the question of jurisdiction, in so far as it involves the power of the United States authorities to seize the preserved eggs in question on the ground that they had passed out of interstate commerce, is an important one, and for that reason does not resist plaintiff in error's motion to advance; but it does resist the application that the case be submitted on briefs. The importance of the question, it insists, demands that the case be argued orally.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1910.

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Office Supreme Court, U. S.
FILED.
DEC 7 1910
JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1910.

No. 519.

HIPOLITE EGG COMPANY, CLAIMANT OF FIFTY CANS, MORE OR LESS, OF PRESERVED WHOLE EGGS,
Plaintiff in Error and Appellant,
vs.
THE UNITED STATES,

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Honorable J. OTIS HUMPHREY, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR AND APPELLANT.

THOMAS E. LANNEN,
For Plaintiff in Error and Appellant.

EDWARD T. FENWICK,
Of Counsel.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1910.

No. 519.

HIPOLITE EGG COMPANY, Claimant of Fifty Cans, more or less, of Preserved Whole Eggs,

Plaintiff in Error and Appellant,

vs.

THE UNITED STATES.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Honorable J. OTIS HUMPHREY, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR AND APPELLANT.

STATEMENT OF THE CASE.

On the 14th day of May, 1908, Thomas & Clarke, a corporation, engaged in the bakery business at Peoria, Illinois, entered into a written contract (Rec., 24) with the Hipolite Egg Company, a corporation engaged in the business of preserving eggs at St. Louis, Missouri, for the purchase by said Thomas & Clarke of four hundred cans of preserved whole egg. This contract was made and executed at Peoria, Illinois. (Rec., 31.)

These preserved whole eggs were simply whole eggs broken out of their shells into five-gallon cans, to which eggs boric acid was added as a preservative. Each can when filled with eggs was sealed. (Rec., 40.) They were fresh and sweet. (Rec., 30.)

By the terms of the contract (Rec., 24) the Hipolite Egg Company agreed to sell Thomas & Clarke four hundred cans of preserved whole egg, f. o. b. St. Louis, and deliver them to the St. Louis Refrigerator & Cold Storage Company in the City of St. Louis, Missouri, and Thomas & Clarke agreed to pay for the eggs on delivery of the Cold Storage Company's receipts to Thomas & Clarke. Hipolite Egg Company further agreed that when Thomas & Clarke from time to time would require some of these eggs, Hipolite Egg Company would take the eggs from the storage company and make shipments of them to Thomas & Clarke and would not charge Thomas & Clarke for the drayage. Thomas & Clarke, by the terms of the contract, agreed to pay the storage.

Between May 14, 1908, and May 21, 1908, the eggs were received at said cold storage warehouse in St. Louis, Missouri, from Hipolite Egg Company for the account of Thomas & Clarke (Rec., 34-39) and thereafter, on or about May 21, 1908, Thomas & Clarke received from the cold storage company a receipt for the whole amount of eggs put up by Hipolite Egg Company under the contract (Rec., 25, 34, 39), and on or about June 1, 1908, Thomas & Clarke paid the invoice of Hipolite Egg Company in full for all of the eggs covered by the contract. (Rec., 27, 39.)

The storage charges were paid by Thomas & Clarke (Rec., 26, 40) and Thomas & Clarke paid the insurance on the eggs while they remained in the warehouse in St. Louis. (Rec., 27, 40.)

Thereafter, during the summer months of 1908, when Thomas & Clarke required any of these eggs they would make requisition on the cold storage company in St. Louis and send it to Hipolite Egg Company for delivery to a boat which would take the shipment to Thomas & Clarke at Peoria. (Rec., 26, 27.) All Hipolite Egg Company had to do with these transactions was to go to the cold storage company and present the order or requisition of Thomas & Clarke for a certain amount of eggs and take the goods to the boat and ship them to Thomas & Clarke. (Rec., 27.)

A number of shipments were made in this manner during the summer of 1908 (Rec., 25), and on November 16, 1908, there remained in the cold storage warehouse in St. Louis 130 cans of these eggs originally put in there under the terms of the contract. (Rec., 25, 27, 33.) About that time Thomas & Clarke gave the Hipolite Egg Company an order on the cold storage warehouse for these 130 cans of eggs (Rec., 27, 40) and Hipolite Egg Company withdrew them from the warehouse and shipped them by boat from St. Louis to Thomas & Clarke at Peoria. (Rec., 39, 40.)

This shipment of 130 cans is the shipment involved in this case. (Rec., 30.) It consisted of 130 separate cans, each can corked and sealed with wax. (Rec., 28.)

When Thomas & Clarke received this consignment of 130 cans, they stored them in the basement of their bakery plant in Peoria. (Rec., 28.)

Thomas & Clarke intended to use all of these eggs

in the manufacture of bakery goods, such as vanilla wafers, cookies and cakes. (Rec., 28, 29.) The way they used the eggs was to open a can and pour the eggs out and thoroughly mix the eggs and then put a certain amount of the eggs in a batch of flour and then put the eggs and flour in a mixer and mix the eggs in with the flour and make a dough. (Rec., 28.) Out of this dough they would make the vanilla wafers and other pastry. (Rec., 28.)

In this manner Thomas & Clarke used about 80 cans of the last shipment of 130 cans (Rec., 40), and in March, 1909, they had about 50 cans left out of the shipment. (Rec., 40.) On March 3, 1909, an inspector of the bureau of chemistry of the United States department of agriculture obtained one original, unbroken can of these eggs from Thomas & Clarke. (Rec., 19.) This can was given to the inspector for the special purpose of having the eggs analyzed. (Rec., 20, 29, 30.) Thomas & Clarke knew at the time he obtained the can that he was a government inspector and wanted the eggs for the purpose of testing them. (Rec., 29.) At the inspector's request they sold the can to him. (Rec., 29.) The inspector paid for the can. (Rec., 19.) This was the only can of the eggs Thomas & Clarke sold. (Rec., 29.) None of them were intended for sale. (Rec., 29.)

The eggs obtained by the inspector were found to contain added boric acid. (Rec., 40.)

Thereafter, on March 11, 1909, a libel (Rec., 1) was duly filed in the District Court of the United States for the Southern District of Illinois, Northern Division, praying seizure and condemnation of

the said cans remaining in the possession of Thomas & Clarke, under the provisions of Section 10 of the Food and Drugs Act of June 30, 1906, 34 Statutes at Large, page 771, and also praying for a decree against Thomas & Clarke for the costs of the proceedings. On the same date a monition (Rec., 4) was issued out of said court commanding the marshal of said court to seize the said eggs then in the possession of Thomas & Clarke, and on the same date the marshal of said court seized 52 cans of said eggs which he found on the premises of Thomas & Clarke in Peoria. (Rec., 5.) The monition commanded the marshal to attach the eggs, but did not command him to summon Thomas & Clarke or any one else. It simply provided for the publishing and posting of a notice to parties interested. (Rec., 4.) At the time of the seizure by the marshal the eggs were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria along with other bakery supplies. (Rec., 40.) The cans seized by the marshal were intended and about to be used for baking purposes at the time of seizure, and were not intended to be sold as eggs in the original unbroken packages, or otherwise, but were then and there in unbroken, original packages, as originally shipped, and were then and there on the premises of Thomas & Clarke in Peoria unsold. (Rec., 40.)

Hipolite Egg Company had guaranteed the eggs to Thomas & Clarke (Rec., 24), and on December 9, 1909, Thomas & Clarke by leave of court appeared specially in court and waived all right, title and interest in said eggs so seized in favor of Hipolite

Egg Company. (Rec., 9.) Thereupon Hipolite Egg Company filed answer to the libel (Rec., 10) and issue was joined. But Hipolite Egg Company did not stipulate to pay costs.

A jury was waived in writing (Rec., 12) and a trial was had in the District Court before his Honor J. Otis Humphrey, presiding judge, on the 9th and 10th of December, 1909. (Rec., 13.)

The trial proceeded until the evidence showed all the facts regarding the purchase of said eggs by Thomas & Clarke and the ownership of said eggs, and the shipment of said eggs from St. Louis, Missouri, to Peoria, Illinois, and the use to which said eggs were to be put, and the disposition to be made of the same by Thomas & Clarke after shipment from St. Louis to Peoria, as aforesaid. (Rec., 37.) Then counsel for claimant moved the court (Rec., 37-38) to dismiss the libel on the ground that it appeared from the evidence that the court was without jurisdiction as a Federal Court to proceed against the eggs in question, because it appeared that said eggs were not shipped for sale within the meaning of Section 10 of the Act of June 30, 1906, and for the further reason that the evidence showed that the eggs had passed out of interstate commerce and beyond the jurisdiction of a Federal Court at the time of the seizure, because at that time the eggs were in the storeroom of Thomas & Clarke and were not intended for sale by Thomas & Clarke in the original unbroken packages or otherwise and were then and there mixed and intermingled with other baking supplies and had been so acted upon by Thomas & Clarke as to be co-mingled with other state property

and that said eggs were then and there state property.

The court overruled this motion and counsel for claimant saved an exception. (Rec., 38.)

At the close of the trial the motion was again renewed (Rec., 38) on the same grounds and also because the evidence showed that a large portion of the shipment of eggs had actually been used for manufacturing purposes. (Rec., 40.)

The court overruled this motion also, and counsel for claimant saved an exception. (Rec., 38.)

At the close of the trial the court found the issues for the libellant. (Rec., 13.)

Thereafter, on December 20, 1909, the court entered its decree (Rec., 14) declaring the eggs to be adulterated within the meaning of the Act of June 30, 1906, because they contained two per cent. of boric acid added as a preservative; also that boric acid is a deleterious ingredient which might render said eggs injurious to health; also that the eggs were illegally held within the jurisdiction of the court and confiscable and liable to condemnation under the said Act. The court also decreed that thirty days after the date of the decree, the marshal destroy the eggs and that judgment be entered against the claimant for the costs of the case and that execution issue therefor. (Rec., 15.)

The trial court found the facts specially. (Rec., 49.)

An assignment of errors was filed (Rec., 17) and a petition for writ of error from this court (Rec., 16), and an order was entered allowing the same

(Rec., 42), but the claimant was required to give bond. (Rec., 42.)

An appeal to this court was also prayed for (Rec., 46) and allowed (Rec., 47) on the sole question of the jurisdiction of the District Court to make and enter the decree, but claimant was required to give bond. (Rec., 47.)

The course of suing out a writ of error and also taking an appeal was adopted out of caution and because a doubt existed in counsel's mind as to the proper practice in a case like this under Section 10 of the Food & Drugs Act of June 30, 1906.

A certificate of jurisdictional questions was filed (Rec., 44) and this court is asked to decide whether under the facts in this case the District Court had jurisdiction *in rem* over the eggs proceeded against; and whether, under the facts in this case, the District Court had jurisdiction to make and enter a decree for costs against the claimant *in personam*.

SPECIFICATIONS OF ERROR.

The District Court erred:

I.

In overruling the motion made by claimant at the close of the evidence for libellant, to dismiss the libel and information for want of jurisdiction. (Rec., 37, 38.)

II.

In overruling the motion of claimant made at the close of all the evidence to dismiss the libel for want of jurisdiction. (Rec., 38.)

III.

In entertaining jurisdiction of the subject-matter of the suit and entering a final decree upon the merits. (Rec., 14.)

IV.

In entering a personal judgment against the claimant, Hipolite Egg Company, for the cost of the prosecution. (Rec., 15.)

BRIEF.

I.

(*Assignment of Errors I, II and III.*)

Section 10 of the Food and Drugs Act of June 30, 1906, (34 Statutes at Large, page 771) does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other food product.

> *United States* v. *Sixty-five Casks Liquid Extracts,* 170 Fed. Rep. 449 (District Court).
>
> *United States* v. *Knowlton Danderine Co.,* 175 Fed. Rep. 1022 (same case in Circuit Court of Appeals).

Opinion of Judge Sater in the District Court for the Southern District of Ohio, Western Division, in the *United States* v. *Forty-six Packages and Bags of Sugar,* No. 1964, on exceptions and demurrer, rendered about September 3, 1910. This case has not yet been reported that counsel can find, and so for the enlightenment of the court and the convenience of all parties it is set out as follows:

> "SATER, District Judge:
>
> The libel is filed under Sec. 10 of the Pure Food and Drugs Act. By that Section it is enacted that 'Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported

from one state, territory, district, or insular possession to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the territory where the same is found, and seized for confiscation by a process of libel for condemnation.' The case does not fall within that provision of the law, because the goods were not seized while in transportation. The section also provides in the alternative that 'any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act * * * having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against' in like manner. 'Having been transported' from where to where? Clearly not from one point in a given state, territory, district, or insular possession to another point in the same state, territory, district, or insular possession, because in that case the article has not passed into interstate commerce. The words, 'having been transported,' &c., are connected by the disjunctive 'or' with the preceding portion of the section. Following the words 'having been transported', is an ellipsis, an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one state, territory, district, or insular possession to another for sale, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable,' &c. This construction of the section is not only rational and in accordance with the maxim *noscitur a sociis,* but is necessary to make the clause applicable to articles which have entered into interstate commerce. The words, 'is being transported,' and 'having been transported,' are coupled together by the

word 'or' and are both unlimited by the same qualifying terms. The view above expressed is in accordance with the ruling in *U. S.* v. *65 Casks of Liquid Extracts*, 170 Fed. Rep., 449, affirmed in 175 Fed. Rep., 1022. The libel does not show that the articles seized were transported for sale. It does not show whether the articles were shipped by some one in Illinois to himself at Cincinnati, or to some other person, or how or from whom the Gerke Brewing Company obtained possession or acquired ownership, if such it has.

There is an averment in the third paragraph of the libel that the packages are 'owned by or in the possession of the said Gerke Brewing Company, doing business as aforesaid, for the purpose of being used and manufactured, sold and consumed as food.' The closing language of the quoted passage is somewhat ambiguous, but giving it the construction most favorable to the Government—that the Brewing Company's purpose is to sell it for consumption as food,—I do not see how the otherwise defective nature of the libel is helped out.

In view of the conclusion above reached, it is perhaps unnecessary to rule on the contention that there should be a specific averment that the percentage of ash is greater than that found in standard climax sugar, or as to whether or not the Court must take notice of the standard fixed by the Circular issued by the Secretary of Agriculture. The fact that there is a doubt as to the Court's duty in that respect (see Judge Dyer's opinion) will suggest an averment in future libels that will obviate the objection urged. The exceptions and demurrer are sustained. Exceptions may be noted.

The District Attorney disputes the right of the Corn Products Refining Company to interplead or file a brief in the case unless further evidence is offered that it is a party in interest or that it is the *bona fide* owner of the packages of sugar which have been seized. As Judge

> Thompson permitted the Company to answer, and subsequently another order was granted permitting the answer to be withdrawn and the exceptions to the demurrer to be filed, to which latter the District Attorney assented, the objection comes too late.
>
> The exceptions and demurrer are ruled on the extent above named. Several of them were waived by the defendant."

When goods shipped into a state have been so acted upon by the party in the state receiving them that they become mixed with the general property in the state and the goods become incorporated with the mass of state property they are no longer in Interstate Commerce.

Waring v. *The Mayor,* 8 Wall. 110.
Low v. *Austin,* 13 Wall. 29.
Cook v. *Pennsylvania,* 97 U. S. 566.

The court does not obtain jurisdiction to proceed against the *res* when the statute makes the *res* liable to be proceeded against only under a certain state of facts and such facts do not exist with respect to the *res* proceeded against. And in such a case the court has no jurisdiction to confiscate the *res.*

A United States District Court has no jurisdiction to proceed *in rem* under Section 10 of the Food and Drugs Act of June 30, 1906, against goods that have passed out of Interstate Commerce before the proceeding *in rem* was commenced.

II.

(*Assignment of Error IV.*)

In a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against a claimant who simply files an answer but who does not enter into a stipulation to pay the costs of the proceeding.

The Monte A., 12 Fed. Rep. 331.

Where the law provides only for a proceeding *in rem*, a proceeding *in rem* and a proceeding *in personam* cannot be joined in the same libel.

The Alida, 12 Fed. Rep. 343.

ARGUMENT.

I.

(Assignment of Errors I, II and III.)

This proceeding is a proceeding *in rem* under Section 10 of the Foods and Drugs Act of June 30, 1906, 34 Statutes at Large, page 768, the 10th Section being found on page 771. The only authority for the proceeding is to be found in Section 10 of the act referred to.

It seems clear that the only transportation which subjects an article to confiscation under that section, if it is adulterated or misbranded, is a transportation *for sale*. In the opinion of Judge SATER, *supra*, in the case of *United States* v. *Forty-six Packages and Bags of Sugar*, the court says:

> "The words, 'having been transported', &c., are connected by the disjunctive 'or' with the preceding portion of the Section. Following the words 'having been transported' is an ellipsis, an omission of words necessary to complete the construction of the sentence. Those words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, having been transported from one State, Territory, District, or insular possession to another for sale, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable', &c. This construction of the

Section is not only rational and in accordance with the maxim *noscitur a sociis*, but is necessary to make the clause applicable to articles which have entered into Interstate commerce."

See, also:

United States v. *Sixty-five Casks of Liquid Extracts*, 170 Fed. Rep. 449; affirmed in 175 Fed. Rep. 1022.

At the trial of this cause all of the evidence touching upon the question of the purchase of the eggs by Thomas & Clarke and the ownership of the eggs, and the shipment of the eggs in Interstate Commerce, and the use to which the eggs were to be put after shipment was heard by the court before the inquiry as to whether or not the eggs were adulterated or misbranded was entered upon by the Court. (Rec., 18 to 37, inclusive.) This evidence showed, and it was entirely undisputed, that the eggs were not shipped for sale, but that they were shipped for the purpose of being used as ingredients in the manufacture of bakery goods.

The Food and Drugs Act of June 30, 1906 (34 Statutes at Large, 768) provides for an action *in personam* against shippers and this action is the principal action contemplated by the act. The proceeding *in rem* authorized by Section 10 is a special proceeding. The authority is limited. The only article of food *liable to be proceeded against* for interstate shipment is an *adulterated* or *misbranded* article which is *being transported for sale*, or *has been transported for sale*. No other article of food is liable to be proceeded against in a case like this. The court has no more authority to proceed against

an article of food under any other circumstances than above enumerated than it would have to proceed against a carload of coal or a product neither a food nor a drug.

The proceeding *in personam* authorized by the law is full and complete and was intended to and no doubt is capable of giving full force and effect to the law. But the proceeding *in rem* was apparently limited to the necessity for such an unusual proceeding, and when the protection of the purchaser and consumer is considered the reason for the limitation may be that a purchaser in a state is not interested in an article shipped in from another state, but which is not going to be sold; or because a consumer in a state is not interested in an article which is shipped into his state from another state, but which is not going to be offered for consumption until it is manufactured into something else. Then the question will be on the manufactured product.

In this case the eggs were sold before they were shipped. (Rec., 24-30-31.) Thomas & Clarke owned them and simply shipped them to themselves to be used in making pastry. (Rec., 28-29.)

It is also our contention that regardless of any other consideration the court had no jurisdiction *in rem* because at the time of seizure the eggs had passed into the general mass of property in the state and out of the field covered by Interstate Commerce. The jurisdiction of the Food and Drugs Act in question can go no further than the power given to Congress under which it was enacted.

We maintain that when we ascertain the extent of the protection afforded a shipper by the com-

merce clause of the Constitution and the extent of the rights of a shipper under that clause, we at the same time ascertain the extent of the operation of the Food and Drugs Act in question, and we say that it has absolutely no force or effect beyond that point where the commerce clause ceases to afford protection to the shipper. Congress could not confer upon the District Court power to exercise jurisdiction beyond that point. We maintain that when goods have passed out of interstate commerce they have passed beyond the jurisdiction of the Food and Drugs Act and beyond the jurisdiction *in rem* of a court enforcing the provisions of that law.

In this case the facts are that at the time of seizure (Rec., 40) the goods were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria, along with their bakery supplies and were intended and about to be used for baking purposes and not for sale in the original unbroken packages or otherwise, and that at that time about eighty cans of the shipment had been used for baking purposes. We maintain that under these facts, the goods had already been incorporated with the mass of property in the state and had passed out of interstate commerce.

In the case of *Waring* v. *The Mayor*, 8 Wall. 110, the court said (page 122):

> "When the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the article already incorporated with the mass of property by the act of the importer."

It is true that in this case the remaining individual packages of the shipment were not broken at the time of seizure, but it would seem that the breaking of the packages or the selling of the goods by the original importer is not the only means by which imported articles may lose their identity as articles of interstate commerce and become mixed with the property of the state. We contend that all of the circumstances surrounding the eggs at the time the question of interstate commerce arises should be considered, and that in this case when all of the facts are considered it is clear that at the time of seizure the eggs by the acts of Thomas & Clarke had become mixed with and incorporated with the mass of property of Thomas & Clarke in the State of Illinois.

All of these facts were brought out before the trial court before the court entered on the inquiry as to whether or not the eggs were adulterated, and we maintain that the court erred in overruling the motion (Rec., 37-38) of counsel for claimant made at that state of the record to dismiss the libel for want of jurisdiction, and that the court erred in proceeding to further hear the case (Rec., 38) on the question of the adulteration of the eggs. Also that the court erred in refusing to dismiss the libel for want of jurisdiction at the close of all the evidence (Rec., 38) when the undisputed testimony showed the facts (Rec., 38 to 41, inclusive.) with reference to the shipment of the eggs, the ownership, the purpose for which the eggs were to be used and the way Thomas & Clarke had acted upon them to be the same as when counsel for claimant made the first motion to dismiss.

II.

(*Assignment of Error IV.*)

The decree of the District Court (Rec., 14) decrees that judgment be entered against the claimant for the costs of the case and that execution issue therefor. (Rec., 15.)

There was no monition issue for Thomas & Clarke or for Hipolite Egg Company or for any owner or claimant. The only monition issued was *in rem.* (Rec., 4.) No citation *in personam* was issued.

Neither Thomas & Clarke nor Hipolite Egg Company entered into any stipulation to pay costs.

All that Hipolite Egg Company did was to answer the libel and defend the eggs for its interest in the same.

This proceeding is entirely *in rem,* and in the case of *The Monte A, supra,* the court said:

> "The ordinary practice in admiralty does not permit a personal judgment to be entered upon a mere libel *in rem.*"

The court also, in the case of *The Monte A, supra,* quotes from the case of *The Volant,* 1 W. Rob. 383, in which case the court said:

> "The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel, and not further. Now, if it were possible, on such warrant, to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there could be no

reason why bail should not be commensurate with the damage, where the amount is not restricted by statute; but if bail could not be demanded beyond the value of the ship, I do not see how the owners, in that proceeding, can be made further responsible. The warrant of arrest is confined to the ship; it goes no further. It appears to me, therefore, that there is no personal liability beyond the value of the ship; for this obvious reason, that the original process would not justify any such proceeding. The appearance given by the individual himself would not justify such proceeding; he has appeared only to protect his interest in the ship."

Again, in *The Monte A* case, the court said:

"In actions at common law, and in actions in admiralty *in personam* a general appearance, though it cannot cure any essential defect of jurisdiction of the subject-matter, (*Cutler* v. *Rae*, 7 How. 729, 731; *The Louisa*, 1 Brow. & L. 59; *The Elenore, Id.* 185; *The Ida*, Lush. 6,) cures any irregularities in the service of process, or even the want of any service. *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Wheelock* v. *Lee*, 74 N. Y. 495, 498; *The Roslyn*, 9 Ben. 119, 129; *Pixley* v. *Winchell*, 7 Cow. 366.

In these cases, the action being general against the person, a general appearance is coextensive with the nature of the action. But even in such actions, where the defendant's person or property has been arrested or attached irregularly, the defendant may appear specially to vacate the proceedings, and the court will not acquire thereby any jurisdiction to proceed to a personal judgment. *Sanford* v. *Chase*, 3 Cow. 381; *Seaver* v. *Robinson*, 3 Duer, 622; *Brett* v. *Brown*, 13 Abb. (N. S.) 295; *Manice* v. *Gould*, 1 Abb. (N. S.) 255. But an action purely *in rem* is itself limited to a proceeding against the *res*, and a general appearance in such an

> action should, it seems to me, be deemed no more general than the limited nature and scope of the action itself, and of no greater effect than a special appearance to vacate an unauthorized arrest or attachment upon a general suit *in personam.*"

Furthermore, the only action authorized by Section 10 of the Food and Drugs Act is a proceeding *in rem,* and that being true a proceeding *in rem* under that section cannot also include a proceeding *in personam.* It certainly cannot include such a proceeding in the same libel. In the case of *The Alida,* 12 Fed. Rep. 343-344, the court said:

> "In the Court below the libel was excepted to and its dismissal urged because it unites a proceeding *in rem* with a proceeding *in personam;* and it is insisted on here. That these remedies are incompatible, and cannot, therefore, be joined in the same libel, is the unquestioned law of England. Cootes, Adm. Pr. 8. So far as the question has been judicially considered in this country there is no substantial diversity of decision. In *Citizens' Bank* v. *Nantucket Str. Co.* 2 Story, 57, and *Dean* v. *Bates,* 2 Wood. & M. 87, it was stated with special emphasis to be the law, that proceedings *in rem* and *in personam* were so different in their character and result that they could not be joined in the same libel. These cases were both decided before the promulgation by the supreme court of rules in admiralty in 1847, and as only exceptional provision is thereby made for a joint libel, the general rule, as stated in the cases referred to, must be considered as receiving the sanction of the supreme court."

It seems clear that the District Court had no jurisdiction to decree that the claimant pay the costs of this case and to order that execution issue therefor.

We therefore ask, on account of the errors urged in this brief, that this case be reversed with directions to dismiss the libel.

Respectfully submitted,

THOMAS E. LANNEN,
For Plaintiff in Error and Appellant.

EDWARD T. FENWICK,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HIPOLITE EGG COMPANY, CLAIMANT OF fifty cans, more or less, of preserved whole eggs, plaintiff in error and appellant,

v.

THE UNITED STATES.

No. 519.

IN ERROR TO AND ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

On March 11, 1909, the United States instituted libel proceedings against 50 cans of preserved whole egg which had been prepared by the Hipolite Egg Co., of St. Louis, Mo., but which at the time was the property of Thomas & Clarke, of Peoria, Ill. Said preserved whole egg was alleged to be an article of food, and under the original libel, as amended on August 10, 1909, the sole ground alleged for seizure was that the product contained "an added deleterious ingredient which may render the article injuri-

ous to health, to wit, said article of food contains added to it a deleterious ingredient known as boric acid." (Rec., pp. 1, 3, 8.)

Thomas & Clarke having filed a waiver, in writing, whereby they in effect transferred all interest in the food product to the Hipolite Egg Co., the latter company was permitted to appear in court and make answer to the libel (Rec., pp. 9, 10), and the case was heard by agreement without the intervention of a jury (Rec., p. 13). After the Government had introduced its testimony, plaintiff in error moved the court to dismiss the libel on the ground that the court had no jurisdiction to pronounce judgment against the eggs because they were not shipped for sale within the meaning of section 10 of the act of June 30, 1906, and because they had passed out of interstate commerce and beyond the jurisdiction of the court at the time of seizure; which motion was overruled by the court (Rec., pp. 37, 38). Evidence was then introduced as to whether or not the food product contained an added deleterious ingredient which might render it injurious to health, which evidence is not set forth in the record, and at the close of the evidence plaintiff in error renewed its motion to dismiss, which was again overruled (Rec., p. 38). The court thereupon made a special finding of facts, as follows:

> The Court finds the facts to be:
>
> 1. This libel is filed by the United States of America in its own right and prays seizure for condemnation of certain articles of food contained in fifty cans, more or less, pur-

ported and represented to be "Preserved Whole Egg" as hereinafter particularly set forth, in accordance with the Act of Congress approved June 30, 1906, and more commonly known as The Food and Drugs Act. This proceeding is brought under section 10 of said act.

2. The Court finds that on or about May 14th, 1908, Thomas & Clarke, an Illinois corporation, with its place of business in the City of Peoria in this District and engaged in the business of conducting a so-called crackers bakery in said city entered into a written contract with the Hipolite Egg Company, a Missouri corporation, doing business in St. Louis, Missouri; by the terms of which contract the Hipolite Egg Company was to put up and preserve a certain quantity of preserved whole egg.

3. The said contract entered into as aforesaid between Thomas & Clarke and Hipolite Egg Company was then and there in words and figures as follows, to wit:

"Thomas & Clarke,
306–9–10–12 South Washington St.

PEORIA, ILL., *May* 14, '08.

Messrs. Thomas & Clarke, Peoria, Illinois.

GENTLEMEN: We hereby agree to sell to you 400 cans of Hipolite Whole Egg at 13½ cents per pound, net, F. O. B. St. Louis, Mo. These to be delivered to the St. Louis Refrigerating and Cold Storage Company and paid for on delivery of Cold Storage Company's receipts to Thomas and Clarke. Each can to

contain 42 pounds net, and quality guaranteed; also guaranteed under Pure Food Laws of Illinois and Missouri. We also agree to take same from said Storage Company on your order as wanted, making shipments to you as required, without charge for drayage; maximum storage not to exceed five cents per can per month.

Yours very truly,

HIPOLITE EGG CO.,
Per W. H. HIPOLITE.

Accepted as contract by Thomas & Clarke this 14th day of May 1908.

THOMAS & CLARKE.
Per H. I. HARDIN."

4. Under the terms of this contract the Hipolite Egg Company prepared the eggs in question in this suit and on or about the 21st day of May, 1908, placed said eggs in a cold storage warehouse at St. Louis, Missouri, in the name of Thomas & Clarke, and a warehouse receipt covering said eggs was issued to Thomas & Clarke and forwarded to them by the Hipolite Egg Company, together with an invoice for the contract price of said eggs. Thereafter, on or about June 1st, 1908, Thomas & Clarke paid said invoice to the Hipolite Egg Company.

5. In the early part of November, 1908, Thomas & Clarke sent a written order on the warehouse where said eggs were stored to the Hipolite Egg Company for the eggs in question to be delivered to Hipolite Egg Company for shipment to Thomas & Clarke. Hipolite

Egg Company thereupon presented said order to the warehouse and obtained said eggs and delivered same to a common carrier for shipment to Thomas & Clarke, at Peoria, Illinois.

6. Thomas & Clarke paid all storage charges on said eggs while in storage at St. Louis as aforesaid. Thomas & Clarke also took out insurance in its own name on said eggs while in storage at St. Louis as aforesaid, and paid all premiums thereon. Thomas & Clarke also paid the freight on said eggs from St. Louis to Peoria. Hipolite Egg Company received no extra compensation for taking said eggs from the warehouse and delivering same to the common carrier.

7. The Court finds that said eggs were transported from St. Louis, State of Missouri, to Peoria, in the State of Illinois, as aforesaid and were received by Thomas & Clarke at Peoria on or about November 16th, 1908.

8. The said shipment consisted of one hundred and thirty cans each can containing about forty-two pounds of eggs. Each can was a separate sealed package. The eggs in the cans were whole eggs, minus the shells, that had been broken out of the shells into these cans.

9. The Court finds that the said eggs were an article of food and contained added to it a deleterious ingredient known as boric acid which may render such article injurious to health, and that the said eggs were in fact injurious to health. And the Court further finds that the amount of boric acid contained in said eggs was approximately two per cent.

and the Court finds that said eggs were adulterated within the meaning of the Act of June 30, 1906.

10. Thomas & Clarke did not know at the time of shipment that said eggs contained boric acid. At the time of making said contract Thomas & Clarke did not know by what process Hipolite Egg Company would preserve said eggs, but did know that the eggs were to be preserved by having added thereto some kind of a preservative in addition to being sealed in air tight cans.

11. At the time of the seizure of said eggs they were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria, along with their bakery supplies.

About 80 cans of said shipment had been used by opening said cans and pouring said eggs into a mixture of flour and other ingredients and thereby making a dough. This dough was baked into pastry, such as vanilla wafers, and this pastry was sold to the public. The fifty cans more or less, seized by the Marshal were intended and about to be used for baking purposes as aforesaid at the time of seizure, and said eggs were not intended to be sold as eggs in the original unbroken packages, or otherwise, but were to be used only as above set forth and were transported as aforesaid only for such purpose, but at the time of seizure said eggs were in unbroken, original packages, as originally shipped, and were then on the premises of Thomas & Clarke unsold.

12. Thomas & Clarke sold one original package of said egg to Inspector McManus, the contents of which was analyzed by the Department of Agriculture and found to contain Boric Acid, and the seizure of this case was made upon the report of said analysis. (Rec., pp. 39, 40.)

Upon this finding of facts judgment was rendered in favor of the United States, directing that the preserved whole egg in question be destroyed, and that judgment be entered against the claimant for the costs of the case, for which an execution was awarded (Rec., pp. 14, 15).

Plaintiff in error prosecuted a writ of error direct to this court upon the ground that the court below had no jurisdiction to pronounce judgment; and that court certifies that the question of jurisdiction was raised in the following manner (Rec., pp. 44, 45):

> The District Court of the United States for the Southern District of Illinois hereby certifies to the Supreme Court of the United States that on the 20th day of December, A. D. 1909, a decree was entered in the above entitled cause confiscating said fifty cans more or less of preserved whole eggs and assessing the costs of said case against Hipolite Egg Company, claimant in the above entitled cause.
>
> And this Court further certifies that in said cause the jurisdiction of this Court is in issue; and that said question of jurisdiction was raised in the following manner:

1st. The libel in this case was a proceeding in rem under Section 10 of the Act of June 30, 1906, (34 Statutes at Large, 771), against fifty cans more or less of Preserved Whole Egg, the libel alleging that said eggs were transported in interstate commerce from St. Louis, Missouri, to Peoria, Illinois, and were adulterated within the meaning of said Act.

2nd. It appeared from the evidence on the part of the libellant on the trial of this cause that said eggs before the shipment alleged in the libel had been stored in a warehouse in St. Louis, Missouri, for about five months, during all of which time the said eggs were the property of and owned by Thomas & Clarke, an Illinois corporation engaged in the bakery business at Peoria, Illinois, in this District.

3rd. On or about November first, 1909, Thomas & Clarke procured the shipment of these eggs from St. Louis, Missouri, to themselves at Peoria, Illinois; and upon receipt of said eggs Thomas & Clarke placed the shipment in their storeroom in their bakery factory at Peoria along with their other bakery supplies.

4th. These eggs were intended for use by Thomas & Clarke for baking purposes, and were not intended for sale by them in the original unbroken packages or otherwise, and were not so sold.

5th. Hipolite Egg Company, a corporation of Missouri, appeared as claimant of said eggs and intervened and filed an answer to said libel and defended this case, but did not enter

into any stipulation to pay the costs of this case.

6th. Upon the close of Libellant's evidence and again at the close of all the evidence counsel for claimant moved the Court to dismiss said libel on the ground that it appeared from the evidence that this Court as a Federal Court had no jurisdiction to proceed against or confiscate said eggs, because said eggs were not shipped in interstate commerce for sale within the meaning of Section 10 of said Food & Drugs Act, and for the further reason that the evidence showed that said shipment of eggs had passed out of interstate commerce before the seizure of said eggs in this case, because it appeared that said eggs had been delivered to Thomas & Clarke and were not intended to be sold by them in the original unbroken packages or otherwise.

7th. This Court overruled said motions, to which rulings counsel for claimant then and there duly excepted, and this Court then proceeded to hear and determine said cause and entered a decree finding said eggs adulterated and confiscating the same and assessing the costs of this case against the claimant, Hipolite Egg Company.

8th. Counsel for claimant excepted to the rendition and entry of said decree on the ground that this Court is without jurisdiction in rem over the subject matter and on the further ground that this Court is without jurisdiction to enter a judgment in personam against said claimant Hipolite Egg Company for costs of said case as aforesaid.

And this Court therefore certifies to the Supreme Court of the United States the following questions of jurisdiction raised as aforesaid:

First. The question of whether this Court had jurisdiction in rem over said eggs transported as aforesaid.

Second. The question of whether this Court had jurisdiction to render and enter a decree for costs against the claimant, Hipolite Egg Company, in personam.

BRIEF AND ARGUMENT.

I.

The article of food in question was, when seized, in the original packages as shipped, and had not passed beyond the jurisdiction of the court by having become mixed and intermingled with other property of the consignee.

From the special findings of the court it appears in brief that the Hipolite Egg Co. entered into a contract with Thomas & Clarke whereby it sold to them 400 cans of preserved whole egg, which was put up in cans containing 42 pounds each and which was subsequently delivered to the St. Louis Refrigerating & Cold Storage Co.; that, as Thomas & Clarke directed, the Hipolite Egg Co. would take from the cold storage and ship to them at Peoria the number of cans designated, and the cans in question were a part of a shipment made November 16, 1908, which consisted of 130 cans; that they were received by Thomas & Clarke at Peoria, Ill., and placed in the storeroom in their bakery along with other bakery supplies; that

80 cans of the shipment had been used by opening the cans and pouring the eggs into a mixture of flour and other ingredients, thereby making a dough, which dough was baked into pastry such as vanilla wafers, and this pastry sold to the public; and that the 50 cans seized by the marshal were intended and about to be used in the same manner, and the eggs were not intended to be sold as eggs in the original unbroken packages or otherwise, "but, at the time of seizure, said eggs were in unbroken, original packages as originally shipped, and were then on the premises of Thomas & Clarke unsold."

Under these facts the United States contends:

1. *The cans of eggs in question had not lost their identity as articles of interstate commerce.*

There have been numerous decisions of this court bearing upon the question of when an article of interstate commerce passes beyond the jurisdiction of the United States authorities, and becomes so changed in form and identified with the common property of the owner as to be subject alone to State laws; but the controlling principle can be well illustrated by the citation of but a few cases which have a direct bearing upon the question.

The leading case, and one which is cited in all subsequent cases, is *Brown* v. *Maryland* (12 Wheat., 419), which arose from an effort on the part of the State of Maryland to impose a license tax upon importers of foreign merchandise and persons selling such merchandise by wholesale, bale, or package, etc. The court held that this could not be

done, and as to when imported goods might become subject to a State tax, said:

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution (pp. 441, 442).

And, after considering certain extreme cases put by counsel for the State, the court continued:

> This indictment is against the importer for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the State by breaking up his packages and traveling with them as an itinerant peddler (p. 443).

The case of *Leisy* v. *Hardin* (135 U. S., 100) is similar in its essential facts to the present case. Leisy & Co. were a firm engaged as brewers in the manufacture of beer in the city of Peoria, Ill., and they shipped certain quarter barrels and one-eighth barrels and sealed cases of beer, which had been manufactured by them at Peoria, to Keokuk, Iowa, consigned to John Leisy, who was a resident of Keokuk

and an agent of Leisy & Co.; the sales and offers to sell there made by John Leisy were of the beer in the original kegs and cases shipped, which when sold were removed from the premises. The court held that the beer, while in these original packages, was not subject to State legislation, and that a statute of the State undertaking to prohibit the sale of the same was repugnant to the commerce clause of the Constitution; and upon this question the court used the following language:

> The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago, &c., Railway Co., supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time we hold that in the absence of congressional permission to do so the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer (p. 124).

In *Schollenberger* v. *Pennsylvania* (171 U. S., 1) the facts were that Schollenberger was the agent of the Oakdale Manufacturing Co., of Providence, R. I., which company was there engaged in the manufacture of oleomargarine; this company shipped to its agent a package consisting of a tub containing 40

pounds of oleomargarine, packed, sealed, marked, stamped, and branded in accordance with the act of Congress; this package was of a form, size, and weight used for convenience in handling and security in transportation, and was placed in Schollenberger's store and was offered for sale as an article of food; and Schollenberger as a wholesale dealer subsequently sold this package to one Anderson. The court held that this package of oleomargarine had not passed from interstate commerce, and was not subject to the laws of the State which prohibited the sale of oleomargarine, saying:

> How small may be an original package it is not necessary to here determine. We do say that a sale of a 10-pound package of oleomargarine manufactured, packed, marked, imported, and sold under the circumstances set forth in detail in the special verdict was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the State. (*Waring* v. *The Mayor*, 8 Wall., 110, 122.) The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, but it can not be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having a right to sell through his agent, a sale thus effected is valid.

> The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages (p. 24).

There is nothing in the decisions of this court cited by plaintiff in error, to wit, *Waring* v. *The Mayor* (8 Wall., 110), *Low* v. *Austin* (13 Wall., 29), and *Cook* v. *Pennsylvania*, (97 U. S. 566), which is in the least antagonistic to the principles declared by the court in the foregoing cases.

In *Waring* v. *The Mayor* it appeared that Waring, who resided at Mobile, Ala., was in the habit of buying and selling imported salt. His custom was to purchase the entire cargo, which came in sacks, before the goods were entered at the customhouse; he furnished his own lighters and took the cargo from the vessel, but the salt was entered at the customhouse by the consignees. The question upon which the case turned was whether or not Waring was an importer, or whether the shippers were the importers and Waring a purchaser from them. The court took the latter view, and held that inasmuch as the salt was imported by the shipper and sold after its arrival in this country to Waring, and the sales made by Waring were the second sales of the imported goods made in the United States, the principle of the case of *Brown* v. *Maryland* had no application.

In *Low* v. *Austin* the facts were that Low and others were importing and commission merchants in San

Francisco, and as such they received a consignment from France of certain champagne wines, upon which they paid duties, and which they stored in their warehouse in San Francisco in the original cases, where they remained for sale. While in that condition, they were assessed for State, city, and county taxes under the revenue laws of California. The court held that they were not subject to such taxation; and as to when imported goods become subject to State laws, the court said:

> The Supreme Court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown* v. *The State of Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, *that the goods imported do not lose their character as imports and become incorporated into the mass of property of the State until they have passed from the control of the importer or been broken up by him from their original cases* (p. 34).

Cook v. *Pennsylvania* arose over a statute of Pennsylvania which undertook to impose a license tax upon the amount of sales of goods made by auctioneers, and it was held that such a tax was void in so

far as it was attempted to be applied to the sale of imported goods sold by the auctioneer for importers in the original packages.

There have been many cases in which the courts have considered what constitutes an original package, but the definition given by the Supreme Court of Iowa in *McGregor* v. *Cone* (104 Iowa, 465, 471, 472) appears to define such package with as much clearness and as nearly in accord with the general authorities upon the subject as can be found elsewhere. The language of the court is as follows:

> It is quite apparent, we think, that the words "original package" have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form or broken and transformed it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the State, and is subject to the laws of that

> State enacted in virtue of its police power (p. 472).

And, citing the decision of this court in *Leisy* v. *Hardin*, and also citing as authority *Brown* v. *Maryland* and *Robbins* v. *Taxing Dis.* (120 U. S., 489), the court proceeds:

> All the cases agree that when the article is once sold by the importer it then becomes subject to the taxing and police power of the State; and it is quite generally held that the same result follows when the original package in which it is imported is broken, and the several parcels are so mingled with other property, or so exposed for sale as to destroy the identity of the package as imported.

Under these cases it is clear that the cans in question had not passed beyond the jurisdiction of the United States authorities. It is true that they were not being held by Thomas & Clarke *for sale* in the form in which shipped, but were held by them for sale in an altered form. The authorities agree that something must be done with the original package before it loses its identity as an object of interstate commerce. If the package is sold in its original form and delivered to the purchaser, or if it be broken and the contents taken therefrom and placed in the merchant's store for the purpose of retail trade, it can no longer be claimed as exempt from State laws. By such action the right to dispose of the article in the form in which shipped, without State interference, is either exercised or lost. So, if it be shipped by the pur-

chaser for consumption, it must be subjected to a change of form; and the mere fact that such package is placed among other property owned by the consignee can no more destroy its identity and release it from the jurisdiction of the Federal authorities, than the placing of the package of oleomargarine, which was the subject of controversy in the case of *Schollenberger* v. *Pennsylvania*, by the agent in his storehouse among other goods intended by him for sale, rendered it liable to the laws of the State.

2. *The fact that the articles in question were the property of Thomas & Clarke when shipped, and that they had them shipped to themselves, to be used in the manufacture of pastry, does not deprive them of the privileges or relieve them from the liabilities of an interstate shipment.*

Counsel cite for authority, principally upon another point, the case of *United States* v. *Sixty-five casks of Liquid Extract* (170 Fed., 449, 455), wherein District Judge Dayton said:

> It (Congress) did not, in my judgment, have power to restrict one from manufacturing in one State such product and removing it from that State to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured (455, 456).

From the insistence of counsel, it appears to be thought that the fact that these eggs were purchased by Thomas & Clarke in St. Louis, and were delivered

to them there, and that they were their eggs when shipped from St. Louis to Peoria, and were intended to be used in making pastry, has some material bearing upon the power of Congress to enact a law applying to their shipment; and the language of Judge Dayton in a measure supports such view. Such idea, however, is refuted by the cases of *Leisy* v. *Hardin* and *Schollenberger* v. *Pennsylvania*. In both of those cases the shipment was made by the owner of the goods to himself or his agent. In fact, under the commerce clause of the Constitution, no importance can be attached to the identity of the shipper and consignee. The power is there vested in Congress to regulate commerce, and that power relates to the articles which are the subject of commerce, regardless of the ownership of such articles; and it is as much within the power of Congress to prohibit the carrying as interstate commerce of an adulterated article which is being shipped by its owner for his own use in the manufacture of a food product, as it is to prohibit the shipment of such article to any other person for a like purpose.

If the distinction claimed were a valid one, then the food and drugs act could be made practically a dead letter, because instead of selling goods for delivery to the purchaser at his place of business, the delivery could be made at the place of the sale, and in every case the shipment made by and in the name of the purchaser to himself.

3. *The articles in question having been shipped from one State into another in violation of an act of Congress*

and having thus become liable to seizure, they might be pursued and seized wherever and in whatever condition Congress has prescribed, regardless of whether they had or had not become subject to the State laws.

The principle controlling this case is entirely different from those applied in the cases heretofore cited. Under the second section of the food and drugs act the introduction of an adulterated or misbranded article of food or drugs from one State, etc., into another is absolutely prohibited, and under section 10 such articles when shipped under the circumstances described therein become "liable to be proceeded against in any district court of the United States, within the district where the same is found, and seized by confiscation by a process of libel for condemnation;" and if the article is found to be adulterated it must be destroyed.

Therefore the product itself is the offender, and the proceeding is directly against the goods; and so far as the power of Congress to legislate is concerned, it may authorize the United States officials to pursue the offending goods as long as they may be identified, and that regardless of whether they may remain in the original packages unsold or not; and such offending goods can not assume any form which will protect them against prosecution and seizure unless their nature and character has been so changed as to deprive them of identification, or to prevent their separation from other goods with which they may have become commingled or united.

This principle is so well recognized and has been acted upon by Congress for such a length of time that it now hardly admits of discussion, but one or two statutory provisions, of the many which Congress has enacted, may be cited by way of illustration. After providing for searches of vessels and vehicles, beasts, or persons, on which or whom an officer may suspect there is merchandise subject to duty, or introduced into the United States contrary to law, section 3062, Revised Statutes, provides that—

> Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture.

And with reference to internal revenue, by section 3456, Revised Statutes, it is provided that if the distiller, or other persons mentioned therein—

> shall knowingly or willfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by this title prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a

> distiller, rectifier, or wholesale (liquor) dealer, all distilled spirits or liquors owned by him or in which he has any interest as owner, and if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States.

In these instances the articles which are made subject to seizure have never been objects of interstate or foreign commerce, and they become subject to the United States laws because they are instruments through or by virtue of which a United States statute is violated. But when the right of seizure has accrued it makes no difference whatever where they may be located, or whether or not they have changed their form, or have been placed among other goods, or are subject to State laws. The only question is one of identification, and as long as that is possible they may be seized by the proper officers of the United States.

Precisely the same principle applies to the statute under consideration. It was within the power of Congress, acting under the commerce clause of the Constitution, to prohibit the transportation in interstate commerce of adulterated and misbranded goods and to authorize the seizure of goods transported in violation of the act, precisely the same as it fell within the power of Congress, under the clause of the Constitution authorizing the imposition of duties, to require the payment of a tax upon importations, and to authorize the seizure of the goods in case they should be unlawfully introduced, or of any

vehicle or animal used in connection with their introduction; and in both cases Congress had the power to prescribe how far goods shipped in violation of the statute might be pursued for seizure. In the present case Congress has provided that the products may be seized as long as they remain unloaded, unsold, or in the original unbroken packages. There is no question that the packages seized were the original ones, and unbroken, as they were in precisely the same condition as when canned for shipment. The fact that the packages had been commingled with other goods belonging to Thomas & Clarke can only be material in determining whether the goods had become subject to the State laws, but that fact is wholly immaterial, as their subjection to State laws set no limitation upon the power of Congress to authorize that they be further pursued.

II.

Section 10 of the act of June 30, 1906, chapter 3915 (34 Stat., 768), when properly construed, authorizes the seizure of the cans of eggs in question at the instance of the United States Government.

Plaintiff in error contends that the preserved whole egg in question was not subject to seizure, because it was not being shipped "for sale" in the form shipped, the purpose of the purchasers, Thomas & Clarke, being to use these eggs in cooking vanilla wafers and other articles of food and to sell such articles when made. The United States insists that when the various provisions of the act are read together and the nature and purpose of the act are

considered, this section should be so construed as to authorize the seizure of an adulterated or misbranded article of food which is being shipped for sale *in any form*, or of any such article, whether intended for sale or not, which has been shipped and remains unloaded, unsold, or in the original unbroken package.

In support of this contention the following propositions and authorities are submitted:

1. *The food and drugs act is a remedial statute, and section 10 thereof prescribes one of the methods of suppressing the frauds aimed at by the act, and said section should therefore be liberally construed.*

The following decisions of this and other courts and general authorities can leave no doubt that the food and drugs act is a remedial statute.

Taylor v. *United States* (3 How., 197, 210) involved a seizure of goods under the customs laws, and with reference to whether the revenue laws of the United States are penal or remedial, although penalties are imposed thereby, the court said:

> Upon the point that the revenue laws, on which the information was founded, were not, as the judge in the court below suggested, to be deemed penal laws in the sense in which that phrase is sometimes used, it may be proper to say a very few words. He treated the point as not of great importance in the case, as we think it was not, since it had no tendency to change the interpretation of the provisions of the revenue laws then under his consideration. In one sense, every law imposing a penalty or

> forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was, therefore, strictly accurate when he stated that "it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law—that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." And he added: "It is in this light I view the revenue laws, and I would construe them so as to most effectually accomplish the intention of the legislature in passing them." The same distinction will be found recognized in the elementary writers, as, for example, in Blackstone's Commentaries (1 Black. Comm., 88) and Bacon's Abridgment (Statute I, 7, 8), and Comyn's Digest (Parliament R. 13, R. 19, R. 20); and it is also abundantly supported by the authorities.

In *Rankin* v. *Hoyt* (4 How., 327, 332) the court, in speaking with reference to customs laws, said that a certain section ought to be construed to embrace the importation in question—

> since this court has recently decided that acts imposing duties are not, as has often been done, to be construed strictly against the Government, like penal laws, but so as "most effectually to accomplish the intention of the legislature in passing them."

In *United States* v. *Stowell* (133 U. S., 1, 12) upon the same subject the court said:

> By the now settled doctrine of this court (notwithstanding the opposing dictum of Mr. Justice McLean in *United States* v. *Sugar*, 7 Pet., 453, 462, 463), statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed so as to carry out the intention of the legislature.

So also, the Circuit Court of Appeals for the Ninth Circuit in *Anglo-California Bank* v. *Secretary of the Treasury* (76 Fed., 742, 748), in construing a customs statute, said:

> Such laws are more remedial than penal in their nature. They are intended to prevent fraud, to suppress public wrong, and to promote the public good, and should always be construed as to effectually carry out the purposes and objects which they were intended to accomplish.

This court, moreover, has not confined this principle to the construction of revenue laws. *In re Coy* (31 Fed., 794), involved a statute designed to promote the purity of elections, and Mr. Justice Harlan, in delivering the opinion of the court below, clearly intimated that, although containing penal provisions, yet the law was remedial in character

and should be construed as such. This opinion is reported in connection with the opinion of this court in the same case in 127 U. S., 733, 739.

In *Farmers, etc., Natl. Bank* v. *Dearing* (91 U. S., 29, 35), the court had under consideration the national banking act, the thirtieth section of which provided, among other things, that the knowingly taking, receiving, reserving, or charging a rate of interest greater than the amount specified, should be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carried with it, or which had been agreed to be paid thereon; and in case a greater amount of interest had been paid, the person or persons paying the same, or their legal representatives, might recover, in an action for debt, twice the amount of interest so paid from the person or association taking or receiving the same. The court in speaking of this section, said:

> The thirtieth section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it.

So, in *New Haven R. R.* v. *Interstate Commerce Com.* (200 U. S., 361, 391), with reference to the construction of the interstate commerce act, the court said:

> It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of

> tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

The general rule with reference to what statutes shall be construed as penal and what as remedial is thus stated in Endlich Inter. Stats., section 333:

> The legal distinction between remedial and and penal statutes is this: That the former give relief to the parties grieved, the latter impose penalties upon offenses committed. It would follow that the construction should be strict or liberal, according as the design to give redress or to impose penalties should appear to lie at the bottom of the enactment; or strict as to one part and liberal as to another, where severable, if the one is confined to punishment and the other extends to redress.

Gray v. *Bennett* (3 Metcalf, 522, 529) involved the construction of an act which provided for the recovery by an insolvent debtor of threefold the amount of interest paid by him on a usurious contract, when a previous statute had provided for the forfeiture of the whole debt and subjecting the party to a criminal prosecution by indictment, or to a *qui tam* action by a common informer; and the court, in construing the latter act, said:

> Admitting then, as the fact was, that the original statutes were clearly penal, the pres-

> ent law, while it is penal to some extent in its consequences, is in fact so modified that it may be said to be adopted into the family of remedial statutes, and though a brother of the half-blood, is nevertheless entitled to its share of the inheritance; or, in other words, has the like privilege of a liberal construction with those statutes which are wholly remedial.

And, in *Reed* v. *Northfield* (13 Pick., 94, 101), a statute which provided for the recovery of double damages for injuries received under certain circumstances, was held to be remedial and not penal.

Ellis v. *Whitlock* (10 Mo., 781) was an action brought to recover a penalty under a statute which in one section allowed treble damages for injuries to trees, etc., arising from trespass, and under the second section imposed a penalty of $5 and double the amount of damages a party might sustain from throwing down or opening doors, bars, gates, etc. The court held that the act was not a penal one; and also that the third section, which provided that penalties might be recovered by action of trespass or debt founded on the statute, embraced rights of action under both the first and second sections, although its language was "all penalties contained in the preceding *section*," the court thus reading the word as in the plural instead of in the singular, as written.

In *Sickles* v. *Sharp* (13 Johnson, 497), the court had under consideration an act, the fourth section of which made it unlawful to fish with seines in certain

parts of the Hudson River during certain hours of the day, there being a subsequent section which inflicted a penalty of $50 for the offense. With reference to how this act should be construed, the court said:

> The rule that penal statutes are to be construed strictly, when they act on the offender and inflict a penalty, admits of some qualification. In the construction of statutes of this description it has been often held that the plain and manifest intention of the legislature ought to be regarded. A statute which is penal to some persons, provided it is beneficial generally, may be equitably construed.

There are special reasons why the principle declared in the foregoing authorities, and especially in the decisions of this court, should be applied in construing the provisions of the food and drugs act. This statute is distinctly remedial in character, in that it was specially designed to correct certain abuses of a most serious nature and to bestow benefits upon the public in general. The beneficial results flowing from its enactment are not confined to any particular class of individuals, but are enjoyed by the people in every walk of life. It is well known that before the passage of this act there were practically no restraints upon those who were engaged in the manufacture and sale of foods and drugs, and that frauds of the most dangerous and reprehensible character were being daily perpetrated upon the public by the shipment between the various States and Territories of foods and drugs adulterated in such manner as to be deleterious to health, and branded in such a way as

to conceal, instead of to reveal, the true nature of the substances which were intended for consumption as a food or for use as a medicine. The evil had become so gross as to create a general demand for a remedy; and it was in response to this demand that Congress passed the act in question.

The intention of Congress was to protect the public against this fraudulent traffic, by prohibiting from interstate commerce and from commerce within the District of Columbia and the Territories, all adulterated or misbranded foods and drugs as defined therein; and the several provisions of the act should be so construed that the manifest purpose of Congress may be accomplished; and no provision should be so restricted as to materially interfere with the enforcement of the act, and thus, in a measure, destroy the legislative intent.

Inasmuch, therefore, as this is a remedial statute, one designed to prevent frauds upon the general public, and the intention of Congress in creating the same is undoubted, the following language of this court in the case of *United States* v. *Freeman* (3 How., 556, 565), is especially pertinent:

> These citations are but different illustrations of the rule *that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed*, the limitation of the rule being that, to extend the meaning to any case not included in the words, the

case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason. This court has repeatedly, in effect, acted upon the rule, and there may be found in the reports of its decisions cases under it like the cases which have been cited from the reports of the English courts. In 4 Dall., 14, "The intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." In 2 Cranch, 33, "A law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature," etc. In the case of *United States* v. *Fisher et al., Assignees of Blight*, in the same book, the court said, "It is undoubtedly a well-established principle in the exposition of statutes that every part is to be considered and the intention of the legislature to be extracted from the whole," etc. In 2 Pet., 662, "A legislative act is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature." In Paine, 11, "In doubtful cases a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the legislature." So in 1 Brock., 162. In the construction of statutes one part must be construed by another. In order to test the legislative intention the whole statute must be inspected.

Also, in Endlich Inter. Stats., sec. 110, it is said:

> Sometimes the governing principle of the remedial enactment *has been extended to cases not included in its language, to prevent a failure of justice, and consequently of the probable intention.*

2. *When all parts of the act are read together, it clearly appears that Congress intended that the shipment of an article of food under the circumstances and for the purpose under and for which the preserved whole egg in question was shipped, should render such product liable to seizure.*

By the second section of the act it is declared that—

> The introduction into any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.

Here is a sweeping prohibition against the introduction of any adulterated or misbranded food or drug into any State, Territory, or the District of Columbia, from any other State, Territory, or the District of Columbia. In succeeding sections the details as to what shall constitute adulteration and misbranding, and how the same shall be determined, are minutely set forth, some of which have special bearing upon the facts in this case.

In the fifth subsection of the seventh section under "foods," it is provided that a food product is adulterated—

> if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

It thus appears that Congress had specially under consideration the use of preservatives of foods, and positively prohibited the use of any such preservative which was an added poisonous or deleterious ingredient which might render the article injurious to health, and permitted the use of such preservative only when it could be entirely removed mechanically from the product and the directions for its removal were printed on the covering. In the present case, the court below specifically found that the article of food in question contained an added poisonous or deleterious ingredient which might render it injurious to health, and therefore there is no question that Congress expressly prohibited the transportation in interstate commerce of this very article.

In section 8 it is declared that the term "misbranded," as used in the act—

> shall apply to all drugs, or articles of food, *or articles which enter into the composition of food*, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

Therefore Congress intended to make the provisions of the act applicable to all articles of food *which were to be used in the manufacture of a food product* as well as to those which were to be consumed in the form in which they were shipped.

But the mere declaration of Congress that adulterated and misbranded foods and drugs are prohibited from interstate and Territorial commerce would be worthless had Congress not also provided some method or methods of enforcing the prohibition. Therefore, to enable the relief sought to become an accomplished fact, Congress inserted two provisions into the act, as follows:

After the general prohibition in section 2 it was enacted that—

> any person who shall ship or deliver for shipment from any State, etc., or who shall receive in any State, etc., and having so received shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any

person any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor.

And the tenth section provides:

That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, *and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages,* or if it be sold or offered for sale in the District of Columbia or the Territories or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the

> provisions of this act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, Territory, district, or insular possession, the court may direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

By these provisions Congress clothed the courts with power to enforce the prohibition, and it was clearly the intention of Congress to make the methods of enforcement coextensive with the prohibition itself, or otherwise the prohibition, to the extent that it was incapable of enforcement, was a mere *brutum fulmen*.

Furthermore, the tenth section was not merely supplementary to the penal provisions of the second section, but it provides the surer and more effective method of accomplishing the purpose for which the act was passed. The object of the act was to prevent the consumption of adulterated foods and drugs, and to require all food and drug articles to be properly branded, and while repeated prosecutions under sec-

tion 2 might cause a manufacturer or dealer to ultimately cease from transporting a misbranded or adulterated product, yet the only effective method of accomplishing an immediate result was to authorize a seizure of the product itself; and therefore there can be no doubt that it was the intention of Congress to make every article of food or drugs shipped contrary to the general prohibition subject to seizure, and section 10 should be so construed unless the language is such as to render such a construction impossible.

3. *A reasonable and natural interpretation of the exact language used in section 10 of the act includes the articles of food seized in this case.*

By this section an article of adulterated or misbranded food or drug is liable to seizure which "is being transported from one State * * * to another for sale, or, having been transported, remains unloaded, unsold, or in original, unbroken packages." Counsel for plaintiff in error place special emphasis upon the words "for sale," and insist that no article is subject to seizure unless it is being shipped "for sale" or has been shipped "for sale." But that the articles seized in the present case may escape, even this contention is not sufficient, but this clause must be construed to mean that the article must have been shipped *"for sale" in the exact form in which it was shipped.* Hence it is insisted that the language of the statute should be modified in two very material particulars, to wit, first, after the words "for sale" should be inserted the phrase "in the exact form in which

shipped"; and, after "having been transported" should be inserted "for sale in the exact form in which shipped"; thus making the provision read that an adulterated or misbranded article of food or drug is liable for seizure which is being transported from one State, etc., to another, "for sale in the exact form in which shipped, or having been transported for sale in the exact form in which shipped, remains unloaded, unsold, or in original unbroken packages."

Manifestly such a distortion of the language of the statute is wholly unwarranted, both because there is nothing in the immediate context to justify it, and because it would lay emphasis upon a matter of minor importance, one which Congress could not have had specially in mind when the act was under consideration, and would, in a very large measure, defeat the very purpose for which the act was passed. It has been heretofore shown that what Congress had in mind was the preservation of the health of the public and the prevention of frauds thereon. *And certainly Congress regarded it as immaterial whether the article was to be sold when shipped, or the shipment was made in furtherance of a sale, and especially whether it was to be sold by a retailer in the exact form of shipment, or was by a manufacturer of other food products to be converted in form, or united with other ingredients, and in this new form, in which the fraud and evil effects would be just as great, was to be offered to the public.*

Therefore, as the congressional intent will be met by supplying by implication neither of the phrases

insisted upon, but by construing the language of the act just as it was written by Congress, the literal interpretation should be adopted. When so construed the act means, that when an adulterated or misbranded article of food or drug is being transported from one State to another, etc., *for sale*—that is, for sale in any form or after mixed with any other substance—; or when such article has been transported and remains unloaded, unsold, or in the original unbroken packages, it is subject to seizure, whether it was transported for sale or for consumption.

The facts in the present case show the absurdity of restricting the application of the act to articles transported for sale in the form and condition in which they are shipped. Here is a food preserved by boric acid, which the court finds to be an added deleterious ingredient which may render such article injurious to health. The principle, of course, would be the same if the eggs were preserved with arsenic. It was not the intention of the purchasers to sell the eggs by the pint or pound to the public from the cans; but they were bakers, and these eggs were mixed with flour, which being reduced to the consistency of dough, was baked into pastry, and in that form sold to the public. The public bought and consumed the eggs and the boric acid, and the health of the individuals thus consuming them was equally threatened by the boric acid in the pastry as it would be by the acid in the egg alone; yet it is insisted that because the public was not expected to buy it in the eggs alone, but it with the eggs was to go into pastry,

the statute does not apply, although there is not a word in the statute to indicate such a restriction. These eggs were undoubtedly prepared for cooking purposes, and what would be the difference to the housewife and those who depend upon her for their food, whether she buys the eggs as prepared and puts them into pastry baked by herself, or buys the pastry of which the eggs are an ingredient. Certainly the language of the statute should not be distorted from its natural meaning to bring about such an absurd result.

Furthermore, the insertion of the words "for sale," after "having been transported," is not at all required to give sense to that part of the clause, but it greatly restricts the scope of the act, rendering its application unreasonable and arbitrary, while its omission gives this provision a reasonable meaning, one in complete accord with all other parts of the act, and consonant with the motives which prompted the legislation. And it is so essential to the successful enforcement of the law, and of such momentous importance to the public, that the restriction insisted upon—that the article must have been transported "for sale" before it is subject to seizure after the transportation ceases—be not adopted, that it is urged that the broad principles of construction applicable to remedial legislation should, if it be found necessary, be applied to this feature of the act, and that it be held that the seizure of the cans of eggs in question was justifiable, though they had not been intended for sale in any form.

4. *The construction insisted upon by plaintiff in error would in a very large measure nullify the beneficent effect of the act, and defeat the object which Congress had in mind in passing the same.*

The effect which the construction contended for by plaintiff in error would have upon the scope of the act clearly appears from a consideration of the many articles of food and drugs shipped in interstate commerce which would not be subject to seizure, although the evil effects from the use of such articles would be the most pronounced.

For illustration, hotels and restaurants receive in interstate commerce large quantities of meat, fish, flour, milk, butter, coffee, etc. All these staple articles of food are subject to adulteration; meats and fish decompose; flour is sometimes treated with poisonous nitrous acid; milk has often been proved by the Department of Agriculture to contain the poison formaldehyde, or enormous numbers of bacteria, showing contamination with filth, and the practice of watering milk is too well known to require comment. Before the enactment of the food and drugs law, butter substitutes sold under the name of butter were common; coffee has been found on the market coated with poisonous lead chromate. But, under the construction contended for by plaintiff in error, none of these articles, if shipped to a restaurant or hotel keeper, to be by him converted into prepared food for the use of his customers, is subject to seizure, because not "shipped for sale" in the form in which shipped. That is, because the fish and meats are

intended to be fried or broiled before sale and consumption, or the milk, butter, and flour charged with poison and filth, are to be mixed and baked into bread or confections; or the coffee is not to be sold as coffee bean, but in the concoction prepared therefrom, it is insisted that section 10 of the food and drugs act does not authorize their seizure.

Furthermore, neither fruits infested with vermin, which are often sold to bakers for use in the manufacture of pastry, nor flavoring extracts containing the noxious wood alcohol, destined by confectioners to become the ingredient of ice cream or sherbet, could be seized. Such construction would also exempt from seizure all articles used in the manufacture of compounded articles of food, as tomato skins and pulp shipped to manufacturers of catsup, though the tomatoes be decomposed and carry an enormous number of bacteria; whisky and spirits shipped to rectifiers, though when leaving the still they be charged with poisonous elements; oils shipped to manufacturers of salad dressing and canners of sardines, though they be a substitute of cottonseed oil, sesame oil, and peanut oil which was common before the passage of the food and drugs act; sugar, sap, and sirups shipped to blenders and compounders of table sirups, though the sugar contain sand or powdered stone; also vegetables and other foods shipped to canners, fruits shipped to makers of wines and cordials, and manufacturers of jams, ciders, and vinegars, though such products be in a decomposed or unhealthful state, and unfit for food purposes.

It can not be believed that Congress intended to thus render section 10 practically a nullity; and no such construction should be placed thereon, unless the language of the act can admit of no other interpretation.

5. *Review of authorities cited by plaintiff in error.*

Plaintiff in error cites the decisions of the District Court for the Northern District of West Virginia, and the Circuit Court of Appeals for the Fourth Circuit, in *United States* v. *Sixty-five Casks of Liquid Extracts.* (170 Fed., 449; 175 Fed., 10, 22.) The facts in that case were entirely different from those presented in the present case. There the Danderine extract which had been seized was manufactured by Parke, Davis & Co., in Detroit, Mich., under contract with the claimant, Knowlton Danderine Co., and was by them shipped to the claimants, who had a warehouse, laboratory, and finishing department at Wheeling, W. Va. The preparation was transported in unbranded casks in carload lots, and it was the intention of the claimants, as it was their custom to do, to bottle the extract in their own warehouse in Wheeling, and correctly brand the same, and then place it upon the market. District Judge Dayton first said that section 10 of the food and drugs act should be construed strictly in favor of the accused. As heretofore shown, this assertion is incorrect, but the principle was not applied by the learned judge because the libel was dismissed on the ground that "the transportation of the liquid was solely to the bottles made in Wheeling instead of the transportation of the bottles from

Wheeling to the liquid manufactured in Detroit, and that it was so bottled in Wheeling and properly branded before any sale or disposition of it was attempted."

As heretofore noted, the court was also of the opinion that Congress had no power to prohibit one from manufacturing in one State a product and removing it from that State to another for personal use and not for sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured, and the decision was rested to some extent upon this supposed limitation upon the power of Congress; but, in this holding, the court was clearly in error.

The real point in the case, and the one which justified the decision of the court, is succintly stated in the short opinion of the Court of Appeals in the following language:

> No attempt to evade the law, either directly, indirectly, or by subterfuge, has been shown, *it appearing that the manufacturer had simply transported from one point to another the product he was manufacturing for the purpose of completing the preparation of the same for the market.*

Hence, the preparation was, when shipped, in process of manufacture and not a completed product, and was not a drug which was required to be branded.

Counsel also quote an opinion recently delivered by Judge Sater at Cincinnati in the case of *United States* v. *Forty-six Packages and Bags of Sugar.* That case appears to have gone off on demurrer to

the libel, and the facts are not fully stated in the opinion; but the learned judge held that the words "for sale" should be inserted after the phrase "having been transported" in section 10. This conclusion was reached on the ground that it was necessary to supply after "transported" the words "from one State, etc., to another, etc.," and hence that it was reasonable that the words "for sale" should also be supplied.

Furthermore, it appears to have been alleged in the libel in that case that the packages seized were owned by or were in the possession of the Gehrke Brewing Co. for the purpose of being manufactured, sold, and used as food; and assuming that this language meant that the company's purpose was to sell the product for consumption as food, the court said:

> I do not see how the otherwise defective nature of the libel is helped out;

but the only defect suggested or considered by the court was that the libel failed to allege that the articles were for sale, and that therefore seizure was not justified inasmuch as no article was liable to seizure which had not been transported for sale. Hence, it is very difficult to understand upon what ground the demurrer was sustained.

IV.

The court did not err in adjudging the costs of the cause against plaintiff in error.

It is true that this proceeding, as instituted, was one *in rem*, but it was prayed in the libel that Thomas

& Clarke, who were alleged to have had possession of the articles in question, and all other persons pretending or claiming to have any right, title, or claim in said articles of food, be cited to appear and answer; and that a decree for the costs of the proceeding be granted against Thomas & Clarke, should the costs not be satisfied out of the proceeds of the sale of the goods. (Rec., pp. 2, 3.) Subsequently Thomas & Clarke appeared in court, and in writing relinquished all right, title, and interest in and to the articles to plaintiff in error, and consented that if the court should find upon the trial of the case that the articles were not confiscable the court might decree that they be delivered to plaintiff in error. (Rec., p. 9.) Thereupon plaintiff in error appeared and filed an answer to the libel (Rec., pp. 10, 11), and it was upon the issues thus presented that the subsequent costs accrued.

Furthermore, it was, by counsel, present upon the hearing and introduced testimony, and hence the court had jurisdiction to render against it any personal judgment which was warranted by law and by the pleadings upon which the case was tried.

It is a settled principle that at common law costs were not recoverable *eo nomine*, and hence they can not be recovered except by statutory authority. (11 Cyc., 24.) But by section 823, et seq., Revised Statutes, it is expressly provided that certain costs shall be taxed and allowed to the officials mentioned, and an itemized list of such costs is there particularly

set forth. (As to the effect of the statute, see *Jordan* v. *Agawam Woollen Co.*, 3 Cliff., 239.)

Therefore, the court in this case was not only clothed with authority, but was positively required, to tax and allow to the several officials the various items of costs to which they, under these sections, were entitled. But the costs could not be adjudged against the United States. (*Stanley* v. *Schwalby*, 162 U. S., 255, 272.)

By section 857, Revised Statutes, it is provided that "the fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the Treasury, shall be recovered in like manner as the fees of the officers of the States, respectively, for like services, are recovered." This section has no relation to the amount of costs that shall be taxed, or in what character of cases taxed, or against whom, but relates solely to the manner in which the costs, when taxed, may be recovered. (*The May H. Brockway*, 49 Fed., 161; *Aiken* v. *Smith*, 57 Fed., 423.)

Under the statutes of Illinois, in which State this case was tried, chapter 33, Code of 1908, sections 7 and 8 (p. 582), provide that when the plaintiff, under the conditions mentioned, is entitled to judgment for costs, they shall be taxed and recovered, together with the debt or damages, by execution; and when the defendant is entitled to costs, they shall be recovered in the same manner. This is precisely the method pursued in the present case. The costs were adjudged

against the claimant (now plaintiff in error), and an execution was awarded against him for the same. (Rec., 14, 15.)

Plaintiff in error's insistence that personal judgment can not be rendered for costs because this proceeding was *in rem*, is not sustained by the authorities cited, nor, it is believed, by any other authorities. Such principle is undoubtedly correct if the party is not before the court, but when the party is in court and subject to its jurisdiction, and the costs accrue at its instance, it is liable for a personal judgment to the extent of the costs, although the proceedings are purely *in rem*. In *The Monte A* (12 Fed., 331), cited by plaintiff in error, it was only held that a judgment *in personam* could not be entered in a suit *in rem* except upon amendment and issue of new process *in personam, or the general appearance of the owner in personam*.

So, in *The Alida* (12 Fed., 343), it was held that a libel could not be sustained which united a proceeding *in rem* with one *in personam*, and the proceeding was therefore dismissed with costs.

The power of the court in such case to assess costs against the defendant was exercised by the Circuit Court of Appeals for the Fifth Circuit in *The Ethel* (66 Fed., 340). This was an action brought against the tug "Ethel" to recover wages alleged to be due the libellant; and though the proceeding was one purely *in rem*, and though no process was prayed against Moore, the claimant, yet a personal judgment was rendered against him. On appeal, the case was re-

versed and dismissed on the ground that under the libel no such judgment could be rendered, *yet the claimant was personally taxed with the costs of the appeal.*

These cases were all admiralty proceedings, but it is provided in the last sentence of section 10 of the food and drugs act that the proceedings in such libel cases "shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States;" and the adjudging of costs in admiralty proceedings is within the discretion of the court. (*Dubois* v. *Kirk*, 158 U. S., 58, 67.)

The general rule with reference to the distinction between actions *in rem* and *in personam* is thus stated in 1 Cyc., 730:

> The distinction between actions *in rem* and *in personam* as it came to us from the civil law is now hardly known to our practice. The civil law action *in rem* was purely impersonal, although not always an action against a thing. On the other hand, our action *in rem* always turns *in personam* for damages *and costs when the thing proves insufficient and the person comes within reach.*

There is nothing in section 10 with reference to costs which prohibits the court from taxing the costs against the claimant. If the articles be sold it is provided that the legal costs and charges be paid out

of the proceeds of the sale, and it is further provided that if the costs of the proceedings be paid and proper bond executed the court may, by order, direct that the articles seized be delivered to the owner; but no other directions are given with reference to the adjudging of costs, and in all other respects the court must, in this particular, be controlled by the general laws upon the subject.

Inasmuch, therefore, as plaintiff in error subjected itself to the jurisdiction of the court, and it was this company which adulterated the eggs and thus rendered the proceedings necessary, and then controverted the allegations of the libel and caused the accruing of the costs of the trial, it was proper for the court, and within its power, to pronounce judgment against it for costs.

For the foregoing reasons the judgment of the District Court of the United States for the Southern District of Illinois should be affirmed.

J. A. FOWLER,
Assistant Attorney General.

DECEMBER, 1910.

HIPOLITE EGG COMPANY *v.* UNITED STATES.

ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 519. Submitted January 5, 1911.—Decided March 13, 1911.

The object of the Pure Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 768, is to keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce to condemn them while in transit, or in original or unbroken packages after reaching destination; and the provisions of § 10 of the act apply not only to articles for sale but also to articles to be used as raw material in the manufacture of some other product.

In construing the Pure Food and Drug Act, all articles, compound or single, not intended for consumption by the producer, are regarded as designed for sale, and for that reason it is the concern of the law to have them pure.

The remedies given by the statute *in personam* and by condemnation are not inconsistent and they are not dependent. *The Three Friends*, 166 U. S. 1.

By the Pure Food and Drug Act adulterated articles are, while in interstate commerce, made culpable as well as their shipper; while in original unbroken packages they can be seized and they carry their own identification as contraband of law; they are subject to the power of Congress to regulate interstate commerce, and they are not beyond the jurisdiction of the National Government because within the borders of a State. *Quære*, how far such articles can be pursued beyond the original package.

Congress can use appropriate means to execute the power conferred upon it by the Constitution and the seizure and condemnation of prohibited articles in interstate commerce at their point of destination in original unbroken packages is an appropriate means. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355.

In a proceeding *in rem* under § 10 of the Pure Food and Drug Act the court has jurisdiction to enter personal judgment for costs against the claimant. *Quære*, whether the certificate in this case presents the question of jurisdiction to award costs.

THE facts, which involve the construction of certain provisions of the pure food act of June 30, 1906, are stated in the opinion.

Mr. Thomas E. Lannen and *Mr. Edward T. Fenwick* for plaintiff in error:

Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other food product. *United States* v. *Sixty-five Casks Liquid Extracts*, 170 Fed. Rep. 449; *United States* v. *Knowlton Danderine Co.*, 175 Fed. Rep. 1022. See also opinion of Judge Sater in the District Court for the Southern District of Ohio, Western Division, in *United States* v. *Forty-six Packages and Bags of Sugar*, No. 1964, on exceptions and demurrer, rendered about September 3, 1910.

When goods shipped into a State have been so acted upon by the party in the State receiving them that they become mixed with the general property in the State and the goods become incorporated with the mass of state property they are no longer in interstate commerce. *Waring* v. *The Mayor*, 8 Wall. 110; *Low* v. *Austin*, 13 Wall. 29; *Cook* v. *Pennsylvania*, 97 U. S. 566.

The court does not obtain jurisdiction to proceed against the *res* when the statute makes the *res* liable to be proceeded against only under a certain state of facts and such facts do not exist with respect to the *res* pro-

ceeded against. And in such a case the court has no jurisdiction to confiscate the *res*.

A United States District Court has no jurisdiction to proceed *in rem* under § 10 of the Food and Drugs Act of June 30, 1906, against goods that have passed out of interstate commerce before the proceeding *in rem* was commenced.

In a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against a claimant who simply files an answer but who does not enter into a stipulation to pay the costs of the proceeding. *The Monte A*, 12 Fed. Rep. 331.

Where the law provides only for a proceeding *in rem*, a proceeding *in rem* and one *in personam* cannot be joined in the same libel. *The Alida*, 12 Fed. Rep. 343.

Mr. Assistant Attorney General Fowler for the United States:

The article of food in question was, when seized, in the original packages as shipped, and had not passed beyond the jurisdiction of the court by having become mixed and intermingled with other property of the consignee.

The cans of eggs in question had not lost their identity as articles of interstate commerce. *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Waring* v. *The Mayor*, 8 Wall. 110; *Low* v. *Austin*, 13 Wall. 29; *Cook* v. *Pennsylvania*, 97 U. S. 566, are not antagonistic to the principles recently decided in cases cited by appellant.

As to what constitutes an original package, see definition given in *McGregor* v. *Cone*, 104 Iowa, 465, 471. The cans in question had not passed beyond the jurisdiction of the United States authorities.

The fact that the articles in question were the property of consignor when shipped to themselves, to be used in the manufacture of pastry, does not deprive them of the

privileges or relieve them from the liabilities of an interstate shipment.

The articles in question having been shipped from one State into another in violation of an act of Congress and having thus become liable to seizure, they might be pursued and seized wherever and in whatever condition Congress has prescribed, regardless of whether they had or had not become subject to the state laws. See §§ 3062, 3456, Rev. Stat. The same principle applies to the statute under consideration.

Congress has provided that the products may be seized as long as they remain unloaded, unsold, or in the original unbroken packages. The fact that the packages had been commingled with other goods can only be material in determining whether the goods had become subject to the state laws, but that fact is wholly immaterial, as their subjection to state laws set no limitation upon the power of Congress to authorize that they be further pursued.

Section 10 of the act when properly construed, authorizes the seizure of the cans of eggs in question at the instance of the United States Government.

The Food and Drugs Act is a remedial statute, and as § 10 prescribes one of the methods of suppressing the frauds aimed at by the act, it should be liberally construed. *Taylor* v. *United States*, 3 How. 197, 210; *Rankin* v. *Hoyt*, 4 How. 327, 332; *United States* v. *Stowell*, 133 U. S. 1, 12; *Anglo-California Bank* v. *Secretary of the Treasury*, 76 Fed. Rep. 742, 748; *In re Coy*, 31 Fed. Rep. 794; *S. C.*, 127 U. S. 733, 739; *Farmers' Bank* v. *Dearing*, 91 U. S. 29, 35; *New Haven R. R. Co.* v. *Interstate Commerce Com.*, 200 U. S. 361, 391; Endlich, Inter. Stats., § 333; *Gray* v. *Bennett*, 3 Metcalf, 522, 529; *Reed* v. *Northfield*, 13 Pick. 94, 101; *Ellis* v. *Whitlock*, 10 Missouri, 781; *Sickles* v. *Sharp*, 13 Johnson, 497.

The statute is a remedial one designed to prevent frauds upon the general public, and the intention of Con-

gress in creating the same is undoubted. *United States* v. *Freeman*, 3 How. 556, 565; Endlich, Inter. Stats., § 110. When all parts of the act are read together it clearly appears that Congress intended that the shipment of an article of food under the circumstances and for the purpose under and for which the preserved whole egg in question was shipped, should render such product liable to seizure.

A reasonable and natural interpretation of the exact language used in § 10 of the act includes the articles of food seized in this case.

The construction insisted upon by plaintiff in error would in a large measure nullify the beneficent effect of the act, and defeat the object which Congress had in mind in passing the same and should not be adopted, unless the language of the act can admit of no other interpretation.

The court did not err in adjudging the costs of the cause against plaintiff in error. While at common law costs were not recoverable *eo nomine*, and hence cannot be recovered except by statutory authority, 11 Cyc. 24, under § 823, Rev. Stat., certain costs may be taxed and allowed to the officials mentioned. *Jordan* v. *Agawam Woolen Co.*, 3 Cliff. 239. See also chap. 33, Illinois Code of 1908, §§ 7, 8, p. 582; *The Monte A*, 12 Fed. Rep. 331, and *The Alida*, 12 Fed. Rep. 343, distinguished; and see *The Ethel*, 66 Fed. Rep. 340; *Dubois* v. *Kirk*, 158 U. S. 58, 67; 1 Cyc. 730.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case is here on a question of jurisdiction certified by the District Court.

On March 11, 1909, the United States instituted libel proceedings under § 10 of the act of Congress of June 30,

1906, c. 3915, 34 Stat. 768, against fifty cans of preserved whole eggs, which had been prepared by the Hipolite Egg Company of St. Louis, Missouri.

The eggs, before the shipment alleged in the libel, were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill.

Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

Upon the close of libellant's evidence, and again at the close of the case, counsel for the Egg Company moved the court to dismiss the libel on the ground that it appeared from the evidence that the court, as a Federal court, had no jurisdiction to proceed against or confiscate the eggs, because they were not shipped in interstate commerce for sale within the meaning of § 10 of the Food and Drugs Act, and for the further reason that the evidence showed that the shipment had passed out of interstate commerce before the seizure of the eggs, because it appeared that they had been delivered to Thomas & Clark and were not intended to be sold by them in the original packages or otherwise.

The motions were overruled and the court proceeded to hear and determine the cause and entered a decree finding the eggs adulterated, and confiscating them. Costs were assessed against the Egg Company.

The decree was excepted to on the ground that the

court was without jurisdiction *in rem* over the subject matter, and on the further ground that the court was without jurisdiction to enter judgment *in personam* against the Egg Company for costs.

The jurisdiction of the District Court being challenged, the case comes here directly.

Section 2 of the Food and Drugs Act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

In giving a remedy § 10 provides that if "any article of food that is adulterated and is being transported from one State . . . to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. . . . The proceeding of such libel cases shall conform, as near as may be, to the proceedings in admiralty . . . and all such proceedings shall be at the suit of and in the name of the United States."

The shipment to Thomas & Clark consisted of 130 separate cans, each can corked and sealed with wax. The eggs were intended to be used for baking purposes. The only can sold was that sold to the inspector for the purpose of having the eggs analyzed. They contained approximately two per cent of boric acid, which the court found was a deleterious ingredient, and adjudged that they were adulterated within the meaning of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 771.

The Egg Company, whilst not contending that the

shipment of the eggs was not a violation of § 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States District Court has no jurisdiction to proceed *in rem* under § 10 against goods that have passed out of interstate commerce before the proceeding *in rem* was commenced. (3) The court had no jurisdiction to enter a personal judgment against the Egg Company for costs.

It may be said at the outset of these contentions that they insist that the remedies provided by the statute are not coextensive with its prohibitions, and hence that it has virtually defined the wrong and provided no adequate means of punishing the wrong when committed. Premising this much, we proceed to their consideration in the order in which they have been presented. The following cases are cited to sustain the first contention: *United States* v. *Sixty-five Casks of Liquid Extracts*, 170 Fed. Rep. 449, affirmed by the Circuit Court of Appeals in *United States* v. *Knowlton Danderine Company*, 175 Fed. Rep. 1022, and *United States* v. *Forty-six Packages and Boxes of Sugar*, in the District Court for the Southern District of Ohio, not yet reported.

The articles involved in the first case were charged with having been misbranded and consisted of drugs in casks, which were shipped from Detroit, Michigan, to Wheeling, West Virginia, there to be received by the Knowlton Danderine Company in bulk in carload lots and manufactured into danderine, of which no sale was to be made until the casks should be emptied and the contents placed in properly marked bottles.

It was contended that the articles, not having been shipped in the casks for the purpose of sale thus in bulk,

but shipped to the owner from one State to another for the purpose of being bottled into small packages suitable for sale, and when so bottled to be labeled in compliance with the requirements of the act, were not transported for sale, and were therefore not subject to libel under § 10 of the act.

The contention submitted to the court the construction of the statute. The court, however, based its decision upon the want of power in Congress to prohibit one from manufacturing a product in a State and removing it to another State "for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles, to be legally branded when so manufactured;" and concluded independently, or as construing the statute, that the danderine company, being the owner of the property, shipped it to itself and did not come within any of the prohibitions of the statute. The case was affirmed by the Circuit Court of Appeals, 175 Fed. Rep. 1022. The court, however, expressed no opinion as to the power of Congress. It decided that the facts did not exhibit a case within the purpose of the statute, saying: "No attempt to evade the law, either directly or indirectly or by subterfuges, has been shown, it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. In reaching this conclusion we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court."

In *United States* v. *Forty-six Packages and Boxes of Sugar* the court construed the statute as applying only to transportation for the purpose of sale. To explain its view the court said: "Following the words 'having been

transported' is an ellipse, an omission of words necessary to the complete construction of the sentence. These words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State to another *for sale* [italics ours], remains unloaded, unsold, or in original, unbroken packages, . . . shall be liable,' " etc. And the court was of opinion that this view was in accord with the other two cases which we have cited. This may be disputed. It may well be considered that there is no analogy between an article in the hands of its owner or moved from one place to another by him, to be used in the manufacture of articles subject to the statute and to be branded in compliance with it, and an adulterated article *itself* the subject of sale and intended to be used as adulterated in contravention of the purpose of the statute.

A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour which the record presents, could be branded to apprise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the proceeding *in per-*

sonam authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. *The Three Friends*, 166 U. S. 1, 49.

The first contention of the Egg Company is, therefore, untenable.

2. Under this contention it is said that "the jurisdiction of the food and drugs act in question can go no farther than the power given to Congress under which it was enacted," and that the District Court, therefore, "had no jurisdiction *in rem* because at the time of the seizure the eggs had passed into the general mass of property in the State and out of the field covered by interstate commerce."

To support the contention, *Waring* v. *The Mayor*, 8 Wall. 110, is cited. That case involved the legality of a tax imposed by an ordinance of the city of Mobile upon merchants and traders of the city equal to one-half of one per cent on the gross amount of their sales, whether the merchandise was sold at public or private sale. Waring was fined for non-payment of the tax, and he brought suit to restrain the collection of the fine, alleging that he was exempt from the tax on the ground that the sales made by him were of merchandise in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were

in the lower harbor of the port. He obtained a decree in the trial court which was reversed by the Supreme Court of the State of Alabama. A writ of error was sued out from this court and the decree was affirmed, on the ground that Waring was not the shipper or consignee of the imported merchandise, nor the first vendor of it, and it was the settled law of the court "that merchandise in the original packages once sold by the importer is taxable as other property," citing *Brown* v. *Maryland*, 12 Wheat. 443; *Almy* v. *California*, 24 How. 173; *Pervear* v. *Commonwealth*, 5 Wall. 479. This also was said:

"When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import."

This case is clear as far as it goes, but the facts are not the same as those in the case at bar.

In the case at bar there was no sale of the articles after they were committed to interstate commerce, nor were the original packages broken. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the Egg Company. We prefer to decide the case on another ground which is sustained by well-known principles.

The statute declares that it is one "for preventing . . . the transportation of adulterated . . . foods . . . and for regulating traffic therein;" and, as we have seen, § 2 makes the shipper of them criminal and § 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part

of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355.

3. Had the court jurisdiction to adjudge costs against the Egg Company? This is contended, and in support of the contention the claimant assimilates this proceed-

ing to one in admiralty. In consequence, it may be supposed of the provisions of § 10 of the Food and Drugs Act that the proceedings "shall conform, as near as may be, to the proceedings in admiralty," and *The Monte A*, 12 Fed. Rep. 331, and *The Alida*, 12 Fed. Rep. 343, are cited as deciding that in a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against the claimant, who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding. Too broad a deduction is made from these cases. They undoubtedly decide that a process *in rem* and *in personam* cannot be joined in admiralty in the same libel, but it was not held that this was because of a want of jurisdictional power in the court. Such view was disclaimed in *The Monte A*, and to show that the framing of a libel against the owner *in personam* and against the vessel *in rem* was not jurisdictional, the court said that a breach of a contract of affreightment could have been so framed "long before the adoption of the Supreme Court rules in admiralty."

It is stated in Benedict's Admiralty, § 204, that "the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction." It may be, as stated in § 359 of the same work, that "in a suit *in rem*, unless some one intervenes, the power and process of the court is confined to the thing itself and does not reach either the person or property of the owner." If, however, the owner comes in, or an intervenor does, his appearance is voluntary. He becomes an actor and subjects himself to costs, and this even if his ownership be averred in the libel. Waple Proceedings In Rem, page 100, § 73; *United States* v. *422 Casks of Wine*, 1 Pet. 547.

And such seems to be the necessary effect of Admiralty Rules 26 [1] and 34.[1] It is provided (Rule 34) that if a third

[1] For these Rules in full see 210 U. S. 552, 554.

person intervene, for his own interest, he is required to give a stipulation with sureties to abide the final decree rendered in the original or appellate court. It is in effect conceded that if such a stipulation be given, a judgment for costs can be rendered. But, upon what theory? The concession confounds the relation between the stipulation and the judgment, and makes the security for the payment of the judgment the source of jurisdiction to render it—jurisdiction according to the contention, which the court does not have as a Federal court.

Even, therefore, upon the supposition that the principles of the admiralty law are to apply to the proceedings under § 10, we think the court had jurisdiction to render a judgment for costs against the Egg Company.

So far our discussion has been in deference to the contention of the Egg Company, but it is disputable if the certificate presents a question of jurisdiction as to costs. The District Court gets its jurisdiction of the cause from § 10 of the Food and Drugs Act, and whether the libel may be *in rem* and *in personam*, or whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power. It certainly had jurisdiction of the person of the Egg Company.

Decree affirmed.